This sixth verse of the Chilean National Anthem was rarely sung under the elected governments that preceded the 1973 military coup, but was revived during the military government when schools were required to sing the full version every Monday morning. After the return to democracy, the armed forces still sang the verse as a gesture of protest at moments of civil-military tension.

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CHILE
WHEN TYRANTS TREMBLE:
The Pinochet Case

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I. SUMMARY AND RECOMMENDATIONS

The arrest and probable trial in Spain of former Chilean dictator Gen. Augusto Pinochet have rekindled hopes of justice for thousands of victims of his brutal seventeen-year rule. The Spanish court's action and the United Kingdom's decision to initiate extradition proceedings reflect a new international determination — spurred on by the twin genocides in Bosnia and Rwanda and facilitated by the end of the Cold War — to bring to an end impunity for crimes against humanity. The case opened up new possibilities for the exercise of universal jurisdiction, in that the Spanish court sought to judge crimes alleged to have been committed by a former head of state in his own country and against his own subjects. The court verdicts establishing the lawfulness of Pinochet's arrest and extradition were a dramatic lesson in the implementation of international human rights law. At this writing, growing rumors of Pinochet's ailing health are fueling speculation that the U.K. authorities might order his release on humanitarian grounds. Whether or not Pinochet is eventually sent back to Chile, the international repercussions of the case have been and will continue to be enormous.

Human Rights Watch has been deeply concerned about human rights in Chile since the establishment of its Americas division in 1981, and has monitored closely developments since Pinochet stepped down in 1990. Human Rights Watch intervened in support of the jurisdiction of the Spanish court in the hearings of Pinochet's appeal in the House of Lords, pointing out that political and legal constraints in Chile made it impossible for Pinochet to be tried in his own country. As this report shows, a year from Pinochet's arrest steps which must be taken to make Pinochet's trial in Chile possible have still not been taken. The former dictator continues to benefit from parliamentary immunity and an amnesty law that has been invoked repeatedly in past years to prevent human rights prosecutions. However, the Pinochet case has had important and largely unforeseen consequences in Chile. The case has helped foster a more open debate about the legacy of the military government, has stimulated the action of the courts, and has created greater awareness of Chile's international obligations in the field of human rights. Although the institutional, political, and legal obstacles to accountability remain in place, there is a sense that Chile has at last embarked on an effort to confront its past, the outcome of which is no longer easy to predict.

Forebodings expressed by opponents of Pinochet's prosecution that "reopening old wounds" would destabilize Chile's allegedly fragile democracy were shown to be greatly exaggerated. Except for moments of political tension and noisy street demonstrations when decisions went against Pinochet, there have been only isolated episodes of violence. Now under the command of a more youthful leadership, the military has avoided the menacing postures of the Pinochet years and has generally used constitutional levers to influence government decisions. Nor have the deep political divisions over Pinochet's rule prevented contacts and discussions among all the political parties in a search for points of agreement on the human rights issue. The armed forces for the first time are participating in an open-ended debate, sponsored by the government, with human rights lawyers and representatives of civil society. Yet a fundamental shift in the military's attitude on the substantive issues still seems a long way off. The big hurdle — a truthful and unconditional acknowledgment by the military leadership that the systematic violations of human rights under Pinochet's rule were carried out in execution of a criminal government policy — has yet to be crossed.

The most encouraging development has been in the courts, which in the course of the year have charged three generals, including a former member of the military junta, and at least thirty officers and former officers of the army and air force for grave human rights crimes, including extrajudicial executions, political assassinations, torture, and kidnapping. The Supreme Court has allowed prosecutions to proceed despite an amnesty law in force since 1978, due to a new doctrine which in theory permits the conviction of those responsible for "disappearances." It does not, however, improve prospects of justice for other crimes, such as extrajudicial executions and torture. There have been notable advances in the investigation of two egregious human rights crimes committed in the 1980s and not covered by the amnesty law.

The Pinochet crisis re-focused attention on the undemocratic parts of the Chilean Constitution, in particular on the need to abolish appointed seats in the Senate, the upper house of Chile's Congress. President Frei

announced in May a proposal to enable the executive branch to hold a referendum on constitutional change. Safeguarding the courts' independence and prioritizing constitutional change should now be key government objectives.

A Dictator's Arrest

On October 16, 1998, officers of the London Metropolitan Police, acting at the request of Spanish magistrate Baltasar Garzón, arrested General Pinochet while he was recovering from back surgery in a private London clinic. Pinochet, now eighty-three and a senator with life tenure, led the Chilean army in a violent military coup against elected President Salvador Allende on September 11, 1973, proclaimed himself president, and held power until 1990. The military regime he headed dismantled Chile's long-established democratic institutions, privatized its economy, and tried to eradicate left-wing parties and organizations in a reign of terror that claimed more than 3,000 lives, involved the torture of many tens of thousands more, and forced over a quarter-million Chileans into exile. At this writing, Pinochet remains under house arrest in England facing extradition proceedings that could bring him, within months, before a court in Madrid to face charges of torture and conspiracy to commit torture.

The House of Lords, Britain's highest court, found in two successive rulings that Pinochet's arrest was lawful and that he did not enjoy immunity as a former head of state from extradition for these crimes. The House of Lords itself annulled its first verdict in an unprecedented ruling which accepted that it might be tainted with the appearance of bias due to the association of one of the Law Lords with Amnesty International, which intervened in the hearing. In its second ruling, the House of Lords based its judgment on the United Nations Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment, which Chile, Spain, and Britain ratified and incorporated into their domestic law at the end of the 1980s.

These historic decisions were evidence of a growing consensus in the international community that human rights transcend national boundaries, limiting the immunity of former heads of state and even the prerogatives of national sovereignty. They added to an impressive list of historical precedents, starting with the Nuremberg trials after the Second World War, which established the principle that there should be no immunity for perpetrators of the gravest crimes, no matter who they are or where their crimes were committed. That principle was enshrined in Resolution 95[1] of the United Nations General Assembly (1946), in the statutes establishing tribunals for the former Yugoslavia and Rwanda, and in the treaty for the new permanent International Criminal Court adopted in July 1998 in Rome. Yet few states had shown the courage to put these principles into practice. The drama of the London events was enhanced by the unusual notoriety surrounding Pinochet, the brutality of his regime and his invulnerability, until now, from the action of the law.

The Spanish investigation of Pinochet's crimes began with a criminal action filed in July 1996 by the Association of Progressive Prosecutors, acting in a private capacity, for the murder or "disappearance" in Chile of seven Spanish citizens. From these limited beginnings, the prosecution expanded into a massive indictment for genocide, murder, and the torture of thousands of Chilean subjects, both inside and outside Chilean borders, covering the full span of Pinochet's rule. Subjected to the exigencies of British extradition law in the *habeas corpus* hearings before the House of Lords, the case was to crystallize around the single issue of torture. Moreover, the Law Lords limited the time span during which torture cases were admissible to the final year of Pinochet's rule, subsequent to December 1988, when the provisions of the Convention Against Torture were in force in each country. Yet the approval by the Law Lords of the charge of "conspiracy to torture" as an extraditable offense meant that the extradition proceedings would probably focus, not only on post-1988 cases, but also on Pinochet's alleged role in instigating, supervising, and defending a policy to torture opponents throughout the military regime.

After the arrest, Switzerland, Belgium, and France joined Spain in seeking Pinochet's extradition for crimes committed against their nationals, and German and Swedish authorities opened investigations. In the United States, a District of Columbia judge continued to investigate Pinochet's implication in the 1976 car-bomb murder in Washington of former Allende minister Orlando Letelier del Solar and U.S. citizen Ronni Karpen Moffitt, whose perpetrators ─ agents of Pinochet's secret police, the National Directorate of Intelligence (Dirección

de Inteligencia Nacional, DINA) and Cuban exiles they contracted in the U.S. ─ had been tried and convicted in the U.S. and Chile. Should the U.S. request Pinochet's extradition for this crime, the Chilean government has said that it would not contest the jurisdiction of a U.S. court as it did that of the Spanish court, since the crime was committed in the U.S. capital.

The Dispute over Territoriality

The events in London presented a serious and unexpected challenge to the Concertación de Partidos por la Democracia, the center-left coalition currently led by President Eduardo Frei Ruiz-Tagle, which has held power since Pinochet stepped down in March 1990. After the conviction and imprisonment of former DINA chief Gen. Manuel Contreras in 1995, and the subsequent breakdown of political negotiations on the issue of human rights trials, human rights scarcely featured on the agenda of the Frei administration.

The government, hemmed in by the combined weight of the military and the political right, had consistently rejected judicial action against Pinochet. His immunity was one of the unstated rules of the transition Concertación leaders negotiated with the military after Pinochet lost a crucial plebiscite in 1988. Ten years later, after stepping down as army chief in March 1998, Pinochet assumed a lifetime Senate seat, provided to presidents who have served six years in office. This gave him parliamentary immunity from criminal process. Article 58 of the Constitution requires the Supreme Court to authorize the prosecution of a member of Congress before trial proceedings can be instituted, except for crimes detected in the act. For years it was considered unthinkable that a court still dominated by Pinochet's appointees might vote for his indictment for human rights crimes. Although most of these justices have been replaced by democratic appointees, no judge has yet applied for Pinochet's immunity to be lifted.

Chile's civilian government is respected in international fora for its democratic credentials and policies supporting international human rights. On September 11, 1998, the twenty-fifth anniversary of the military coup and barely a month before Pinochet's arrest in London, Chile signed the Rome Statute for the establishment of an International Criminal Court (ICC). Chilean officials say that the nation's own experience contributed to their government's enthusiastic adhesion to the ICC project. By signing, Chile pledged to support efforts to set up the international machinery to try heads of state and government officials responsible for crimes again humanity, war crimes, and genocide when such trials cannot be held in their own country. A bill to ratify the statute is currently under debate in Chile's Congress.

The government has, however, drawn an artificial line between international justice exercised by a recognized international court like the ICC and justice delivered by a domestic court exercising extraterritorial jurisdiction. It maintains this objection even though extraterritorial jurisdiction is provided for in international law, expressly so in the Convention Against Torture, which the Pinochet government ratified in 1988. From the outset, Frei and his ministers stated their opposition to the Spanish proceedings publicly and refused to cooperate with the Garzón investigation. Having demanded initially that the United Kingdom respect Pinochet's diplomatic immunity as a "special envoy" of the Chilean state, President Frei held that the former dictator's arrest and possible judgment in Spain were an illegitimate invasion of the jurisdiction of Chilean courts. The Chilean military brought pressure to bear in a series of urgently called meetings of the National Security Council, in which the four commanders-in-chief pressed the government to take more extreme measures.

Although Frei resisted calls from the army and the right to sever diplomatic ties with the U.K. and Spain, his government mounted an intense diplomatic campaign for Pinochet's release, and took symbolic reprisals against both countries. The government intervened in defense of Chilean jurisdiction in the March 1999 hearing of the House of Lords. It lobbied to gain support for its position among its Mercosur trading-bloc partners, in the Vatican, and at the United Nations. It called on Britain to release the former dictator on humanitarian grounds, citing his age and purported ill-health. It pressed the administration of Spanish President José María Aznar to agree to arbitration of the dispute between the two countries, invoking a mechanism contemplated in Article 30 of the Convention Against Torture. In September 1999, Chile recalled its ambassador in protest when Spanish

Foreign Minister Abel Matutes turned down the Chilean request, arguing correctly that his government may not intervene in a judicial decision. Despite bitter complaints by Pinochet's supporters that the government could have done more to bring him home, its persistence has been striking, especially since these diplomatic initiatives were spearheaded by two successive foreign ministers, both of them as Socialists declared opponents of Pinochet.

In reply to domestic critics who questioned this flurry of diplomatic activity in favor of the former dictator, Frei administration officials asserted that the government of Chile was not protecting Pinochet in person but defending a principle of international law, that of equality between states and the autonomy of their legal systems. In reality, however, the choice presented was not between two competing jurisdictions but between a trial in Europe or no trial at all. Human Rights Watch argued in a detailed legal submission to the House of Lords that, government assurances notwithstanding, a trial of Pinochet in Chile was virtually impossible under current political and legal constraints. Announcing his decision in April 1999 to proceed with the extradition hearing, Home Secretary Jack Straw pointed out that Chilean courts had made no formal claim for jurisdiction or asked Great Britain for Pinochet's extradition.

Chile Unreconciled

Chile remains deeply divided by its violent past, in many ways symbolized by the figure of Pinochet himself. As rival demonstrators took to the streets following the general's arrest and the first House of Lords decision, many observers believed the U.K.'s action placed the transition and even Chile's democratic stability in jeopardy by re-opening old wounds that time had begun to heal. The events did, indeed, reactivate bitter divisions that are still deeply etched beneath the country's apparently tranquil surface.

Despite its abysmal human rights record, Pinochet's regime retained until the end the support of some 40 percent of the electorate (as seen in the plebiscite and the 1989 elections that brought the regime to a close, both generally held to be fair) and the abiding gratitude and loyalty of most of the political right and of the business community. These sectors believed that only military intervention had rescued the country from communism, chaos or civil war. In their view, the much-maligned Pinochet carried out beneficial surgery on the Chilean political system and revolutionized its economy, bringing a backward country into the modern world. The politicians and businessmen who benefited from the political opening and the bonanza of privatizations in Pinochet's final years defended the regime to the hilt, claiming that human rights violations were isolated and committed by both sides and were best forgotten in the interests of future generations.

Their view of Pinochet differed radically from that held by a majority of Europe's new political generation, experiencing a new post-Cold War climate in which human rights had gained increasing acceptance as currency in the political debate. During the dictatorship, only a besieged minority in Chile was aware of the atrocities committed by government agents during the 1970s and 1980s. The refusal of most of the conservative opposition to accept the facts so well-known abroad, especially in countries that received thousands of exiles from Pinochet's rule, was only slightly mitigated by the publication in 1991 of the report of the National Commission of Truth and Reconciliation (known as the Rettig Commission). The commission's 2,000-page report and a follow-up issued in 1996 by its successor, the National Corporation of Reparation and Reconciliation, established an official record of 3,197 victims who lost their lives due to violation of their human rights under the military regime, including 106 who were killed by armed opposition groups. The two bodies did not have a mandate to investigate or quantify cases of torture or other abuses apart from killings. Although the Rettig Commission was politically balanced and reached its conclusions by consensus, all the branches of the armed forces, and particularly the army, vehemently rejected its analysis of the scope, causes, and responsibility for human rights violations. Their congressional allies, many of whom had participated in Pinochet's government, continued to hold the toppled government of President Salvador Allende responsible for the coup and for its tragic aftermath. They regarded human rights as a banner of their traditional political adversaries, the center-left parties that now comprise the government coalition. Many saw efforts for justice as simply a tool for political revenge. The Concertación's weakness in the Senate, dominated by supporters of the military regime thanks to the presence of non-elected senators, made it impossible to implement many of the Rettig Commission's most important recommendations for the protection of human rights.

As a result of Pinochet's arrest, it is now obvious in Chile for the first time that this implacable position is seriously out of step with world opinion. The current year has seen the first relatively open debate in the media since the early years of the Aylwin administration (1990-1994) about the human rights legacy of the military government. After years of neglect, the right of relatives to know the fate of 1,158 people who "disappeared" at the hands of Pinochet's agents, without any accounting or explanation, is now widely considered the most important moral issue facing the nation. Concern has spread for the first time across the political board that the victims are owed answers by those responsible and that the success of Chile's political transition hinges on answers being provided. Some politicians on the conservative right are now willing to consider that human rights violations were the result of a government policy, a possibility hard to imagine a year ago.

As Chile nears December 1999 presidential elections, the political climate does not bear out the doom-laden predictions of opponents of Pinochet's arrest who claimed that it would bring chaos, instability, and violence, upsetting Chile's progress toward full democracy. As the campaign gets underway, politicians on both sides of Chile's left-right divide clearly wish to avoid the shadow of Pinochet and the human rights issue. This mutual interest in claiming the center ground was seen in the rounds of private conversations held by parties across the spectrum to explore solutions to the demands for justice, hopefully to be implemented before the winning candidate takes office in March 2000. Moreover, although historical ideological divisions still weigh heavily in Chilean political life, a majority of public opinion is increasingly indifferent to them. Opinion polls at explosive moments of the Pinochet crisis showed that more than two-thirds of the respondents did not think that the crisis affected their personal lives or that democracy was in danger. A solid majority wanted Pinochet to face justice, and most wanted this to happen in Chile.

Signals from the military suggest that there are differences of opinion among the generals about what action should now be taken. The Chilean armed forces, in particular the army, are caste-like and highly disciplined institutions, and internal dissent is rarely perceptible to the outsider. Observers believe that Pinochet's arrest has made it more costly for the current military chiefs to continue to defend his government's actions unconditionally. Under Pinochet's leadership until March 1998, the army rigidly denied responsibility for anything but isolated abuses and used its powers to the full to block human rights investigations in the courts. Chile's current military leaders, led by Army Commander-in-Chief Gen. Ricardo Izurieta, belong to a different generation, and their commitment to their institutions' credibility as non-political, professional institutions makes them more sensitive to international opinion. Against this trend must be set the indelible imprint left by Pinochet on the Chilean army and the continuing influence in the army of the generals, mostly now retired, who led the repression.

Statements in favor of a national accounting for the events of the coup and its aftermath of human rights violations have come from Navy Commander-in-Chief Adm. Jorge Arancibia. He is one of a group of military officials who have met with party leaders and human rights lawyers in recent months to explore proposals to obtain information on the "disappeared." The airforce has taken an unprecedented step by declining to contest jurisdiction in a human rights trial implicating some of its former officers. However, the armed forces' publicly stated position has not changed in its essentials. General Izurieta continues to deny the institutional responsibility of the army for human rights violations and has repeatedly stated that the army possesses no information on the fate of the missing. As this report went to press, Admiral Arancibia first denied that the navy committed torture, and on the following day corrected himself and said that abuses had occurred but were committed without official consent by officers confronting extreme circumstances.

Only time will tell whether the military's professed commitment to reconciliation will translate into an honest acknowledgment of responsibility, or simply be another evasion, as these statements unfortunately suggest. That this question is being posed at all, even though its answer is still very uncertain, is a positive consequence of the international attention focused on the Pinochet case.

The Struggle for Justice

More significant changes have occurred in the Chilean courts, in particular the consolidation of a new doctrine on the 1978 amnesty law, until now the most important obstacle to accountability in Chile.

The military's recipe for national reconciliation was to bury the past with a decree seeking to prevent any legal accounting. In April 1978, having declared an end to the state of siege that had provided legal cover for systematic human rights violations, the military junta issued Decree 2,191, the "amnesty law," ostensibly as a measure to promote reconciliation. The law was an attempt to prevent the prosecution of serious crimes committed between September 11, 1973 and March 10, 1978. Although it also led to the pardon of several hundred political prisoners (many of them earlier expelled from Chile and not allowed to return), in the long term the law benefited overwhelmingly those who had participated in the military repression at its height.

The Concertación's electoral program in 1989 included the derogation or annulment of the amnesty law, but the policy was abandoned even before President Aylwin took office. Moreover, both Aylwin and Frei have refused to back legislation to limit the amnesty law's effects. Instead, the first post-Pinochet government pledged, in Aylwin's much-quoted phrase, to seek justice "to the extent possible" *(en la medida de lo posible*). Both the United Nations Human Rights Committee and the Inter-American Commission on Human Rights have condemned Chile's amnesty law as incompatible with international law and held that it prevents Chile from fulfilling its obligation to provide justice and reparation to victims of gross violations of human rights.

Although the amnesty law has led to the closure of court investigations into the "disappearance" of 170 victims, about one-sixth of the total, it has not been applied across the board. Decisions in individual cases have ultimately depended on the composition of the Supreme Court chambers issuing final rulings on appeals against the application of the law. Chile's highest court, while extremely jealous of its autonomy, has often acted like a thermometer of the political temperature existing at the time.

While Pinochet was in power, his hand-picked judges on the Supreme Court closed scores of "disappearance" cases with disgracefully little investigation. During the Aylwin government, many first-instance judges and some appeals court panels began to insist that the facts be fully clarified and those claiming immunity under the amnesty law identified before the amnesty could be applied. As a result of this so-called "Aylwin doctrine" (it was personally advocated by President Aylwin), scores of senior officers, including retired generals, were summoned to testify in the courts.

In 1995, the Supreme Court convicted former DINA head Gen. Manuel Contreras and his deputy. Brig. Pedro Espinosa, for the 1976 car bomb attack that killed former Allende minister Orlando Letelier and U.S. citizen Ronni Moffitt in Washington D.C. (due to insistence by the U.S. government, the Pinochet government had expressly excluded the case from the amnesty law). With Contreras in jail, the Supreme Court back-pedaled on the amnesty law, closing emblematic cases like that of Carmelo Soria, a Spanish citizen and United Nations diplomat who was abducted and murdered by military agents in 1976 (the case was a key one in the early investigations of the Spanish judges). The military's congressional allies introduced motions into Congress aimed at putting an end to these court investigations once and for all, in exchange for a non-judicial mechanism to investigate the fate of the "disappeared." Measures proposed by Aylwin in 1993 and by Frei in 1995, although more nuanced, also limited the transparency of judicial investigations; they justified these measures as the inevitable price of obtaining the "truth." In each case, the proposals were defensive responses to military pressure to put a stop to court investigations, and all of them failed to pass Congress due to political divisions on the issue within the Concertación parties.

By mid-1999, however, there were signs of a significant change of attitude among senior judges, due in large part to a 1997 reform of the structure of the Supreme Court and the appointment of a new slate of justices in 1998. In September 1998, the Second Chamber of the Supreme Court, now composed entirely of democratic appointees, for the first time invoked Common Article 3 of the Geneva Conventions of 1949 to reverse the closure of a "disappearance" case. On July 20, 1999, the same chamber rejected a *habeas corpus* appeal lodged by former

Gen. Sergio Arrellano Stark and four other army officers who had been arrested and charged with kidnapping in the "Caravan of Death" case, a particularly egregious episode involving multiple executions and "disappearances" in October 1973 which implicated soldiers allegedly acting with special authority from Pinochet himself. The case was part of an investigation opened in January 1998 by Judge Juan Guzmán Tapia into a series of criminal complaints lodged by individuals and organizations against Pinochet (at the last count there were more than forty separate proceedings, all of them under investigation by Judge Guzmán). In its July 1999 ruling, the Supreme Court unanimously endorsed Guzmán's decision to exempt from the amnesty law cases in which the fact of death could not be legally certified and in which the victim, abducted, therefore must be presumed to be still missing.

This decision implied that the amnesty law was inapplicable to other "disappearances," and it opened the door to hundreds of new appeals against the closure of these cases. It meant that only in cases where the death could be certified to have happened between September 11, 1973 and March 10, 1978 would the author of the crime be exempt from prosecution. If the information was withheld, the case would remain open indefinitely and could even lead to convictions. Experience dictates caution in interpreting the lasting significance of a Supreme Court verdict. Since, under Chilean law, jurisprudence has no binding effect on future cases, there is room for the Supreme Court to reverse or modify its doctrine. However, it is notable that a subsequent decision by the Fifth Chamber of the Santiago Appeals court on the "Caravan of Death" case upheld the Guzmán doctrine while rejecting an appeal for the indictment of other officers for the crimes of murder and torture.

The July 1999 Supreme Court verdict sparked an immediate reaction from the military and its parliamentary allies. The pro-military bloc in the Senate accused the court of invading the powers of the legislature by tacitly derogating laws in force. The army generals assembled for three days to discuss the implications of the verdict. The four service chiefs met Minister of Defense Edmundo Pérez Yoma on July 23, 1999 to express their concern that the "parade" of officers and former officers before the courts diverted the armed forces from their professional role and hampered efforts at national reconciliation.

By its unanimous verdict the Supreme Court undoubtedly gave some support to the arguments advanced by the Chilean government in the House of Lords that current conditions permitted Pinochet and other military officers to be judged for their crimes in Chile. Press reports in late September that Judge Guzmán was preparing to send a letter rogatory to the U.K. authorities requiring Pinochet to answer a list of questions relating to the Caravan of Death case and other human rights crimes also suggested that the courts were inching closer to this goal. If Pinochet were granted clemency and repatriated on humanitarian grounds, his withdrawal from public life in Chile would be a likely outcome, and his trial for human rights violations no longer the extravagant fantasy it had been when he was arrested. If, on the contrary, Pinochet faced extradition to Spain, chances that his ailing health might fail while appeals in the British courts dragged on, would mean that Chile might finally be given a martyr instead of justice.

The Frei administration was pulled in opposite directions by the need to satisfy international demands that the former dictator be brought to justice and its fears for the stability of the transition. Even though Concertación officials defended judicial autonomy against the criticisms of the right, the army's protest at the Supreme Court's July decision spurred the government to return to the quest for a political solution involving limits to judicial accountability.

A series of private meetings held since Pinochet's arrest between lawyers close to the Concertación and members of the armed forces and the parliamentary opposition appear to have convinced government officials that the new military leadership was prepared to provide information on the "disappeared." However, due to the failure of earlier initiatives, ministers have been reluctant to commit to any new proposal unless prior agreement could be reached between the two sides. In the immediate wake of the controversy caused by the "Caravan of Death" decision, Defense Minister Pérez Yoma announced the bold idea of hosting face-to-face meetings between the armed forces and the relatives of the victims, the first direct contact ever between them. He was unable, however, to secure the participation of the major organizations representing the relatives, who considered that any

negotiations might debilitate the role of the judges precisely when they seemed poised to challenge the amnesty law. The opening conversations, held on August 31, 1999, included human rights attorneys acting in their own capacity, delegates of the armed forces, and representatives of civil society intervening in a personal capacity as observers and guarantors.

At this writing it is impossible to predict the results of these talks. Earlier proposals discussed in Congress in 1993, 1995 and 1998 contemplated either extrajudicial mechanisms to receive information on the "disappeared" or offers of immunity or secrecy to witnesses in court proceedings. If measures limiting the scope or transparency of court investigations are proposed in the talks, as the military undoubtedly want, lawyers representing the victims have said they will not support them. It is very doubtful that this deadlock will be broken unless a vital new ingredient is added to the talks, such as a frank acknowledgment of responsibility by the armed forces, and their unconditional commitment to assist judicial investigations. While the discovery of physical remains is, to be sure, of major importance for humanitarian reasons, truthful descriptions by the institutions concerned of the methods used, acknowledgment of their absolute wrongfulness, and a public renunciation of the use of such methods in the future are also required. Moreover, government policy must give priority to securing justice for the victims of the military regime, as established by international standards to which Chile is committed.

Constitutional Reform

Human rights reforms radical enough to secure these guarantees of justice and to bring Chilean legislation into line with international standards have been obstructed throughout almost a decade of democratic rule by the authoritarian Constitution introduced by Pinochet in 1980 and accepted by his political opponents as the ground rules of the transition. Several provisions of this Constitution violate political rights protected by international instruments, such as Article 25 of the International Covenant on Civil and Political Rights, which refers, *inter alia*, to the right "[t]o vote and be elected at genuine periodic elections which shall be by universal and equal suffrage." After a decade of democratic rule, Chile has a only a partially elected legislature. Under the Constitution, nine members of the forty-eight-person Senate (the legislature's upper chamber) are appointed by the president, the Supreme Court, and the National Security Council (Consejo de Seguridad Nacional, CSN). They include two former Supreme Court justices, a former comptroller general of the republic, four former generals, a former rector, and a former cabinet minister. Under two elected governments, these appointed senators have held the balance of power in the Senate and acquired the power to veto or drastically modify government proposals approved in the Chamber of Deputies, the lower house.

Through the CSN the armed forces also have powers to bring to the president's attention their views on any matter that they consider may affect the stability of the country or national security, effectively an institutionalized channel for military pressure on government decisions. While the Concertación has consistently criticized this constitutional provision, it has been unable to revoke or amend it. Resolute opposition to constitutional change by the political parties that supported the Pinochet regime, together with the substantial majorities required for reforms, have left Chile on the brink of the millennium with a political system designed to confront the challenges of the Cold War.

Both Presidents Aylwin and Frei attempted constitutional reforms but later abandoned them due to blocking tactics by pro-military legislators and the appointed senators (a notable exception was a 1997 reform of the procedure for appointments to the Supreme Court). Many prominent Concertación leaders, including Aylwin himself, considered the "transition to democracy" to be over by 1994, when a working relationship had been established with the armed forces and the parliamentary opposition. A pragmatic acceptance of the "military enclaves" (residues of *de facto* military power established in the Constitution) became firmly established as a hallmark of the governing coalition. As a result, neither government was able to implement much of the program on which it was elected, including important measures to strengthen protection of human rights.

The fate of measures to restrict the ambit of military justice in human rights cases provide an example of the effects of the undemocratic composition of the Senate. Reforms introduced by Aylwin's justice minister,

Francisco Cumplido, fell far short of their initial objectives due to objections by unelected senators, including former members of the Pinochet government. Under current laws, military tribunals usually have jurisdiction in crimes involving military personnel on active duty ─ including the Carabineros police force. The civilian judges who initiate the investigation must frequently surrender the case to these courts when it comes to trial. Civilian judges do not have authority to investigate on military premises. Three of the five members of the military appeals courts (Cortes Marciales) are officers on active service, and therefore lack functional independence. The army's general auditor, a ranking general, occupies a seat on the Supreme Court, which has the final word on cases previously heard in military courts. These arrangements contribute to military impunity, particularly in relation to crimes committed during the Pinochet era. They are inconsistent with Chile's obligations under international law and contradict the views of international human rights bodies like the United Nations Human Rights Committee and the Inter-American Commission on Human Rights.

Declassification: the United States Opens Its Books

During 1998 pressure mounted on the Clinton administration to cooperate with the Spanish investigation by declassifying and releasing official documents on the military government in Chile. Investigations in a Senate Select Committee studying U.S. intelligence operations in the mid-1970s (the Church Committee) established that during the Nixon administration the Central Intelligence Agency (CIA) had been involved in a covert plan to prevent the 1970 election of socialist President Salvador Allende, and to destabilize his government thereafter. To what extent the CIA was involved in the planning or execution of the September 11, 1973 coup remains tantalizingly unclear, as does the question of whether it had an operational relationship with Chilean intelligence agencies during the Pinochet era.

By comparison with many European states, the Clinton administration's reaction to Pinochet's arrest was low-key, even sympathetic to the predicament of the Chilean government, a position U.S. officials termed neutral. While refusing to comment on the judicial aspects of the case, in November 1998 Secretary of State Madeleine Albright said, "In Chile, the citizens of a democratic state are wrestling with a very difficult problem of how to balance the need of justice with the requirements of reconciliation...[and] I think significant respect should be given to their conclusions." The United States had refused to sign the Rome Statute for the establishment of the International Criminal Court and was known be deeply preoccupied about the effects of international accountability on its own soldiers and policy makers. However, the U.S. also had an immediate interest in the Pinochet case. Although the Justice Department initially decided against making a request for Pinochet's extradition to the U.S. to stand trial for the Letelier-Moffitt assassination, the case remained open.

Most sensitive of all for Washington were requests from Pinochet's victims in the U.S. and members of Congress for the declassification of documents relating to the CIA's activities during the first years of the military government, and in particular its relations with Pinochet's secret police, the DINA. Documents declassified in 1998 and 1999 showed that U.S. officials had detailed information on the extent and severity of the atrocities that followed the coup and had even cooperated with the DINA in tracking political suspects.

On June 30, 1999, the U.S. released 5,300 documents relating to the period 1973-1978, totaling more than 20,000 pages, the first installment of a potentially explosive accounting known as the Chile Declassification Project. These documents throw light on the inner workings of the military regime and in particular on the relationship between the DINA, Pinochet, and other high-ranking military officers. They leave no doubt about the direct responsibility of Contreras to Pinochet himself and show that other army officers who vehemently opposed the DINA's methods were repeatedly overruled by Pinochet. This information is of obvious importance to the Spanish trial.

Moreover, the documents confirm that U.S. officials had detailed knowledge of human rights violations during this period. They knew of systematic torture practiced by the DINA and other intelligence agencies. They knew about Operation Condor, a plan to carry out terrorist attacks on political targets in other countries, before a car-bomb claimed the lives of Letelier and Moffitt in Washington. According to a declassified cable from then-

Amb. Nathaniel Davis, the Chilean air force requested U.S. assistance to establish a detention center for political detainees "to ensure that detainees are given humane treatment," a request Washington rejected.

Despite these revelations there are conspicuous gaps in the documents so far declassified. Nothing is revealed about the operational activities of the CIA at the time and its relationship with the Pinochet's regime's security agencies. The Clinton administration deserves credit for its efforts to declassify information that can help establish the truth about this tragic period of Chilean history; only by revealing the full story, however, can the U.S. provide answers to questions inevitably raised about its own role in the events.

Justice Department prosecutors continue to investigate the Letelier-Moffitt case. On September 1, 1999, a rogatory letter was sent to the Chilean Supreme Court asking for cooperation with the U.S. investigation. The letter allegedly requested, among other things, documentary evidence collected by Supreme Court Justice Adolfo Bañados during the investigation that led to the conviction of Contreras and Espinosa. According to Chilean press reports, the Justice Department also requested tapes of reported conversations between Pinochet and Contreras, potentially crucial evidence in establishing the role of Pinochet in the assassination of Letelier and Moffitt.

Recommendations to the Chilean Government

Human Rights Watch welcomes the Chilean government's early signature of the Rome Statute for the Establishment of the International Criminal Court. The signing, on September 11, 1998, the twenty-fifth anniversary of the military coup, showed Chile's clear commitment to international efforts to end impunity. Every effort should be made to speed the ratification bill through Congress.

Given the demands it faces for a consensual formula on human rights trials, the government must not lose sight of Chile's international obligations to provide effective channels for relatives of the victims to obtain justice. The government should continue to ensure that the courts discharge their obligations without pressure from the other branches of government. Measures that limit the action of the courts or that protect the identity of witnesses in exchange for information leading to clarification of human rights crimes only perpetrate impunity and diminish the transparency of the judicial process, preventing Chilean society from knowing the full truth about what occurred. In order to meet its international obligations, Chile must:

- Ensure that the amnesty law is not used to close court investigations of crimes against humanity such as extrajudicial executions, "disappearances," and torture, preventing the prosecution and punishment of those responsible;

- Reform the system of military justice, restricting the jurisdiction of military courts to properly military offenses, and eliminating their powers to try civilians for any offense;

- Enable civilian judges or officials of the civilian judiciary to carry out investigations on military premises without impediment;

- End the representation of the armed forces on the Supreme Court;

- Ensure that the investigation currently being conducted by Judge Juan Guzmán Tapia remains under civilian jurisdiction;

- Cooperate with the Spanish court investigating the case against General Pinochet by making available information requested by Judge Garzón and respecting petitions to appear to testify.

The political parties should seek a clear mandate in the forthcoming elections on the measures needed to make Chile's Constitution fully democratic and to ensure respect for political rights. They should note the Final Observations in March 1999 of the Human Rights Committee established to monitor compliance with the

International Covenant on Civil and Political Rights that "[t]he powers accorded to the Senate to block initiatives adopted by the Congress and the powers exercised by the National Security Council, which exists alongside the Government, are incompatible with article 25 of the Covenant. The composition of the Senate also impedes legal reforms that would enable the State party to comply more fully with its Covenant obligations." To ensure compliance with its international obligations under the covenant, Chile must:

- Abolish the system of appointed senators and ensure that all members of Congress are elected by popular vote;

- Abolish the National Security Council or replace it with a purely advisory body on which civilians have a majority.

Any proposal, such as those discussed in Congress in 1996, that seeks to limit human rights in exchange for constitutional reforms should be firmly rejected.

Recommendations to the United States Government

The Clinton administration should cooperate fully with investigations underway in courts in Spain and Argentina into crimes committed during the Pinochet government by making available its confidential records and allowing key witnesses to be interviewed. Furthermore, it should continue with the process of declassification, ensuring that the public has access to documents, particularly those of the CIA and the Department of Defense, that help establish objectively the role played by the U.S. government in Chile's human rights tragedy.

II. BACKGROUND

The Overthrow of Allende

On September 11, 1973, the armed forces led by General Pinochet overthrew the left-wing government of President Salvador Allende Gossens in a ruthlessly executed coup, in the aftermath of which more than a thousand people died. President Allende shot himself after the Chilean air force bombed the presidential palace where he was holding out with his personal bodyguards and a small group of advisors. Imposing a state of siege across the country, the military junta, presided over by Pinochet, hunted down members and sympathizers of the Allende government, especially members of the Socialist Party, the Communist Party and the extreme-left Movement of the Revolutionary Left (Movimiento de la Izquierda Revolucionaria, MIR).

Most of the repression was carried out by a new entity, the Directorate of National Intelligence (Dirección de Inteligencia Nacional, DINA), which first emerged in October 1973. This body, headed by Pinochet's former pupil, army Col. Manuel Contreras Sepúlveda, accrued enormous power, largely supplanting the intelligence branches of the armed forces, until it was dissolved in 1977. The DINA was formally subordinate to the military junta but in practice responded solely to the orders of General Pinochet. Contreras initiated and coordinated a plan of cooperation between the DINA in Chile and parallel military intelligence agencies in Argentina, Uruguay, Paraguay, Bolivia, and Brazil. The plan's purpose was to trade prisoners and intelligence in an effort to eliminate left-wing opposition activity in the participating countries, as well as to monitor the activities of exiles in the United States and Europe. The plan, which included the surveillance, "disappearance," and assassination of political targets, went by the code-name "Operation Condor." Documents found in the archives of the Paraguayan police intelligence services following the fall of dictator Gen. Alfredo Stroessner in February 1989 confirmed the

extent of this coordination. Chilean and Argentinian state agents were responsible for the abduction in Argentina and "disappearance" in both countries of scores of Chileans seeking to escape the repression in Chile. The DINA conspired with anti-Castro Cuban terrorists and Italian neo-Fascists to murder prominent Chilean opposition leaders in exile. On September 30, 1974, Gen. Carlos Prats, Pinochet's predecessor as army commander-in-chief, and his wife Sofía Cuthbert, were killed by a car bomb in Buenos Aires. A year later, on October 6, 1975, Christian Democrat leader Bernardo Leighton and his wife Anita Fresno were gravely wounded in a shooting attack in Rome by a DINA-contracted Italian terrorist. The most notorious crime committed as part of Operation Condor was the September 21, 1976 car-bomb assassination in Washington D.C. that claimed the lives of Allende's former foreign minister, Orlando Letelier, and U.S. citizen Ronni Moffitt.

There were 3,197 victims of executions, "disappearance" and killings from 1973 to 1990, according to the Rettig Commission and its successor, the National Corporation of Reparation and Reconciliation. Government agents secretly disposed of more than 1,000 of these victims presumably after their torture and murder. Except in 178 cases, the fate or burial places of the "disappeared" remains unknown to this day. General Pinochet suppressed members of the Chilean armed forces who opposed the growing power of the DINA and its notoriously abusive behavior and called for an early return to democracy. In addition to extrajudicial executions, "disappearances," and torture, Pinochet's regime was also responsible for widespread arbitrary detention, lack of due process, exile and internal banishment of government opponents, and other systematic violations of civil and political rights.

In August 1977 the military junta, by now with Pinochet as its formal head, dissolved the DINA and replaced it with a more innocuous-sounding body, the National Information Center (Central Nacional de Informaciones, CNI). In the following year the dictatorship ended the state of siege which had been in force since the coup. However, these measures did not signify a real break with the past. Many of the powers conferred on the executive by the state of siege were added to the continuing state of emergency, which remained in force. The CNI was tasked with "protecting the normal development of national activities and the maintenance of the institutional order," concepts drawn verbatim from Decree 1,009 which regulated the state of siege. The CNI inherited the DINA's files and much of its personnel, including General Contreras. In November 1977, however, Pinochet fired Contreras as its director due to the scandal caused in the U.S. by the Letelier assassination.

On April 19, 1978, the Pinochet government decreed an amnesty (Decree Law 2,191), which applied to "all those persons responsible for the commission of crimes, as accomplices or guilty of their cover-up, during the State of Siege in force from September 11, 1973 until March 10, 1998, provided that they are not presently committed for trial or sentenced."[1] The 1995 conviction of General Contreras and Brig. Pedro Espinosa for the Letelier-Moffitt assassinations is the only crime in that period for which members of the military or the police have been found guilty and sentenced, and this was possible only because the case was specifically exempted from coverage by the amnesty.[2]

[1] The ostensible purpose of reconciliation was clearly contradicted by the law's actual effects. Article 2 of Decree Law 2,191 granted amnesty to those convicted by military tribunals since September 11, 1973, potentially benefiting hundreds of political prisoners. In practice, however, most of these prisoners had had their sentences commuted to exile and had already left Chile. Although the amnesty law canceled their penalties, the government issued administrative decrees preventing their return indefinitely. See Humberto Lagos Schuffeneger, "El derecho de vivir en la patria," in Comisión Chilena de Derechos Humanos, *Encuentro Internacional de Magistrados "Poder Judicial y Derechos Humanos*," Santiago, October 1987.

[2]The background and evolution of the Letelier case are described in several of our earlier reports, among others, Americas Watch, *Human Rights and the "Politics of Agreements": Chile During President Aylwin's First Year,* (New York: An Americas Watch Report, July 1991), pp. 61-63. See, also, Human Rights Watch, *World Report 1996,* pp. 75-76, for an account of the drawn-out saga of Contreras's imprisonment in October 1995.

With all political parties banned or in recess, it took fourteen years for a viable opposition to Pinochet's rule to emerge. A new constitution, drafted by Pinochet's civilian political advisors, entered into force in October 1980, naming him president for an eight-year term.[3] After this term a plebiscite would be held to decide if he would hold power for another eight years. The 1980s were punctuated by violence, as an armed group affiliated to the Communist Party and other extreme-left groups tried unsuccessfully to overthrow the dictator by force. Government efforts to combat these groups and to quell mounting street protests against Pinochet's rule, in both of which the CNI played a leading role, provided the pretext for persistent human right abuse. The moderate opposition, which renounced violence, agreed to accept the 1980 constitution and to edge forward the transition by negotiating with the military and its civilian allies. Pinochet lost the October 1988 plebiscite and held presidential elections in December 1989, as the Constitution required. The victorious party, the center-left Coalition of Parties for Democracy (Concertación), took power on March 11, 1990, and its veteran Christian Democrat leader, former senator Patricio Aylwin Azócar, became president.[4]

Pinochet's constitution ensured that the powers of his elected opponents would be tightly circumscribed by a voting system unfavorable to the majority coalition, a Senate of whose forty-eight members nine were non-elected, by military presence in the judiciary, and by the armed forces' influence in government decisions through a National Security Council in which the military had half the votes.

[3]The constitution was adopted by a referendum held on September 11, 1980, under the state of emergency, with all political parties banned and without electoral registers or independent supervision. For a detailed analysis of this process, see Americas Watch, *Chile: Human Rights and the Plebiscite* (New York: An Americas Watch Report, July 1988), pp. 19-29.

[4] The Concertación includes the Christian Democrat Party (which had opposed the Allende government), the Radical Party, the Socialist Party, and the Party for Democracy (Partido por la Democracia, PPD).

Apart from threatening any legislative program that does not have opposition support, the system makes constitutional change very difficult unless the government commands a large majority in the Senate. Constitutional reforms require congressional majorities of three-fifths or two-thirds of Congress members in office, depending on the importance of the amendment proposed.[5] There is no mechanism for a referendum if Congress vetoes a constitutional amendment proposed by the president. As noted below, these restrictions have drastically limited the ability of elected governments to tackle the institutional legacy of the military government or to reverse laws that promote impunity for past gross abuses of human rights. It was in this political and institutional context that a group of lawyers, including Juan Garcés, a former legal adviser to Allende, looked for justice outside Chile.

Political Genocide: the Spanish Accusation

In 1996, Spain's Progressive Association of Prosecutors (Unión Progresista de Fiscales) filed complaints of genocide, terrorism, torture, murder, and other charges against the military juntas that ruled Argentina from 1976 to 1983 and against General Pinochet and other members of the military junta in Chile. Although the case initially focused on the murder or "disappearance" of people of Spanish nationality, both in Argentina and in Chile, it expanded to include thousands of crimes of kidnapping and murder committed during Argentina's so-called "dirty war" and Chile's military dictatorship. These events were linked by the criminal conspiracy Operation Condor, involving both countries, as well as their Southern Cone neighbors, in the secret detention and murder of political dissidents.

The legal case was set in motion using a procedure known in Spain as a "popular action" (*acción popular).* Such cases may be brought by any Spanish citizen, not necessarily an injured party, in the public interest. These actions are private in the sense that they may be pursued whether the public prosecutor participates or not. If the public prosecutor opposes the action, its chances of success are diminished but not eliminated. In the Chilean case, a 1958 Spanish-Chilean convention on dual citizenship permits any Chilean, whether resident in Spain or not, to file suit in Spanish court with the same rights as any Spanish citizen.[6] The investigation was inspired and coordinated by the Salvador Allende Foundation, under the direction of Madrid lawyer Juan Garcés, and assisted by several human rights organizations in Chile that campaigned vigorously against impunity throughout the military dictatorship and under the subsequent governments.

[5]Constitution, Article 116.

[6] See Richard Wilson, "Prosecuting Pinochet: international crimes in Spanish domestic law," *Human Rights Quarterly* 927, November 1999 (forthcoming)..

Under its domestic law, Spain has jurisdiction to try certain serious crimes committed outside its territory. These include genocide, terrorism, piracy and the hijacking of airplanes, forgery of foreign currency, prostitution, and drug trafficking.[7] International treaties Spain has ratified, such as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, allow it to prosecute nationals of another country for acts committed outside Spain.[8] Jurisdiction in such cases is exercised by the Penal Chamber of the Audiencia Nacional, Spain's highest court. Their investigation is the job of the Audiencia Nacional's Central Courts of Instruction. The Chilean and Argentinian cases were assigned respectively to investigating judges Manuel García Castellón of Central Court of Instruction No. 6 and Baltasar Garzón, of Court No. 5, who was also in charge of the investigation into Operation Condor. Shortly after Pinochet's arrest, García Castellón relinquished his part in the Chile case, and Garzón took full charge of the investigation.

Judge Garzón's inquiries faced constant challenges from the Audiencia Nacional's chief prosecutor (*fiscal jefe*), Eduardo Fungairiño, and other members of the Spanish Public Prosecutor's office. Fungairiño argued that Spain could not judge the crimes because they were not committed on its territory or by its citizens and did not fit either the United Nations', or the Spanish, definition of genocide. The charge of terrorism was inapplicable, he argued, because the military regimes were seeking only "a temporary substitution of the established constitutional order, by means of an institutional act whose purpose was precisely to remedy the insufficiencies of that constitutional order in maintaining the peace."[9] In addition, he stated, the cases were *res judicata,* in that they had been subject to an amnesty and therefore already dealt with by national courts. [10] On November 5, 1998, however, the eleven members of the Penal Chamber of the Audiencia Nacional confirmed unanimously that Spain *was* qualified to investigate crimes of genocide, terrorism, and torture committed by members of the military governments of Chile and Argentina. The court also upheld the investigating judge's claim that the court could exercise universal jurisdiction to try a non-citizen for crimes against non-citizens committed outside of Spain's national territory. This was vital to the progress of the case. Jurisdiction rules in Spanish law do not provide for jurisdiction based on the nationality of the victim, on which the original criminal complaint had been based. The Audiencia Nacional decision allowed the charges to be expanded to include crimes against non-Spaniards in both countries and elsewhere.[11]

On December 10, 1998, Judge Garzón indicted General Pinochet for genocide, terrorism, and torture, combining the findings of the Chilean and Argentinian investigations. The indictment details the crimes of a

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[7]Article 23.4 of the Spanish Ley Orgánica del Poder Judicial.

[8]Article 4 of the U.N. Convention Against Torture requires that each State Party must "[e]nsure that all acts of torture are offenses under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. Each State Party shall make these offenses punishable by appropriate penalties which take into account their grave nature."

Article 5, which deals with jurisdiction, requires that "[e]ach State Party shall take such measures as may be necessary to establish its jurisdiction over the offenses referred to in Article 4 in the following cases: (a) When the offenses are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State; (b) When the alleged offender is a national of that State; (c) When the victim is a national of that State if that State considers it appropriate.

Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offenses in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to Article 8 to any of the States mentioned in Paragraph 1 of this article."

[9]Cited in Norbert Bermúdez and Juan Gasparini, *El testigo secreto,* Buenos Aires: Javier Vergara, 1999, p. 27.

[10] "Nota Sobre la Jurisdicción de los Tribunales Españoles" Unsigned document presented to the board of prosecutors and attributed to Fungairiño. Available on the Internet at http://www.derechos.org/nizkor/arg/espana/fuga.html.

[11]See Richard Wilson, "Prosecuting Pinochet."

political regime that killed or made "disappear" more than 3,000 of its citizens and tortured tens of thousands to maintain itself in power, conspiring to commit these crimes outside as well as inside its borders and then ensuring that those responsible enjoyed permanent impunity. The indictment states:

> ...[T]he objectives of the conspirators are the partial destruction of that segment of the Chilean nation made up by all those who oppose them ideologically by means of the selective elimination of the leaders of each opposing sector through kidnapping, followed by disappearance, torture, and the death of persons from the group, inflicting the most grave physical and mental damage. [12]

According to the indictment, Pinochet's secret police chief, Gen. Manuel Contreras, conceived and directed Operation Condor on Pinochet's orders for the purpose of "following the tracks and taking care of Chilean exiles outside the country to the point of killing them or getting them handed over and then making them disappear permanently."

The charge sheet names fifty-eight people killed or "disappeared" immediately after the coup and sixty-eight prisoners who were removed from jail in four northern cities by a helicopter-borne commando led by Gen. Sergio Arellano Stark, acting on Pinochet's orders, and summarily executed (the so-called Caravan of Death).

[12]Reprinted as *La Acusación del Juez Baltasar Garzón Contra el General (R) Pinochet*: *Texto Integro del Auto De Procesamiento de Fecha 10.12.98,* Santiago: Ediciones Chileamerica CESOC, January 1999, p.12. All translations from the indictment are by Human Rights Watch.

The DINA, the indictment states, answered directly to General Pinochet. Its director, Gen. Manuel Contreras, "owed absolute and personal loyalty and obedience to Augusto Pinochet, without any possibility of his taking decisions without the order and consent of the latter."[13] The indictment describes the brutal treatment of detainees seized immediately after the coup and lists fourteen secret torture centers used by the DINA and seven used by air force intelligence and an adjunct clandestine group, the Joint Command (Comando Conjunto). "The system was instituted by express order of Pinochet and the other military commanders," the indictment states, and eventually claimed more than 50,000 victims of torture. As further evidence of Pinochet's responsibility, the indictment cites his comments during a 1974 interview with Lutheran Bishop Helmut Frenz and Roman Catholic Bishop Fernando Ariztía, both founding members of the ecumenical human rights office, Committee for Peace (Comité pro Paz): "General Pinochet, to the puzzlement of the two churchmen, asks them if when they talk of 'physical chastisement' (*apremios físicos*)[14] they are referring to torture, to which they answer yes. At this moment, after leafing through and carefully studying the documents they have presented him, Augusto Pinochet tells them: "You are priests and have the luxury to be merciful; I am a soldier and the President of the whole Chilean nation. The people were attacked by the bacillus of communism and they have to be extirpated, the marxists and communists, they have to be tortured because otherwise they don't sing."[15]

Genocide is a crime against humanity under customary international law and is proscribed by the Convention for the Prevention and Punishment for the Crime of Genocide.[16] In Chile, the Spanish indictment holds, the elimination of a part of the "national group" considered contaminated by beliefs, such as communism or atheism, that were contrary to the values of the military government, constituted genocide. Garzón argued that the concept of genocide is applicable not only to the whole or partial elimination of groups based on nationality, race, ethnicity or religion but also to minorities sharing the same racial, ethnic or religious characteristics as the rest of the population, singled out solely on ideological grounds.

In its unanimous November 5, 1998 decision confirming Spain's right to try General Pinochet for genocide, the Audiencia Nacional argued that it was necessary to respect a customary definition of genocide and not to straitjacket the concept in the narrow language of the convention. Referring to Argentina, the court rejected the argument advanced by the prosecutor that there was no genocide because the repression was political rather than directed against a national, ethnic or religious group:

> It was an action of extermination, not done by chance, in an indiscriminate manner, but that responded to the will of destroying a determinate sector of the population, a very heterogeneous, but distinctive, group. The persecuted and harassed group was composed of those citizens who did not fit within the type pre-established by the promoters of the repression as proper to the new order to be installed in the country.

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[13] As evidence for this assertion, the Spanish indictment quotes a long passage from a 300-page appeal made by Contreras to the Chilean Supreme Court against his conviction, in which he insisted that he answered on a daily basis to Pinochet, to whom he was " absolute subordinate and dependent."

[14] This term is from the Chilean Penal Code (art. 255) and is widely used as a euphemism for torture.

[15] *La Acusación del Juez Baltasar Garzón*, p. 64.

[16] It is defined by the United Nations in the Convention for the Prevention and Punishment of the Crime of Genocide (1948) as " any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group."
Article 2, Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277.(e)

The court used similar arguments in relation to Chile.[17]

The Audiencia Nacional also rejected the Spanish public prosecutor's contention that the Genocide Convention permitted prosecutions only in the country in which the offense was committed.[18] It argued:

> It would be against the spirit of the Convention ─ which seeks a commitment of the Contracting Parties to use their respective penal laws to pursue the crime of genocide as a crime of international law and to avoid that a crime of such gravity go unpunished ─ to treat Article 6 as a rule limiting the exercise of jurisdiction, excluding any jurisdiction different from that contemplated in the precept. That the Contracting Parties have not agreed on the universal persecution of the crime by each of their national jurisdictions does not prevent the establishment by a member State of this kind of jurisdiction for a crime of enormous importance in the whole world and that affects the international community directly, as the Convention itself recognizes.[19]

Although the British home secretary ultimately rejected the genocide charge as a basis for extradition, the Spanish court's views upholding international jurisdiction set an important precedent for future genocide proceedings.

Torture has been a crime in Spain since 1978 and is prohibited under articles 173 and 174 of the penal code. In addition, Spain has ratified the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture. The Audiencia Nacional argued briefly that torture was subsumed as an accessory crime to genocide and that if the court's jurisdiction on genocide were established, the investigation and judgment of torture was *ipso facto* included. However, torture, evidently considered of lesser significance by the Spanish judges, was to occupy center stage when the Pinochet case reached the House of Lords.

Restricted Immunity: Pinochet in the House of Lords

[17] "Fue una acción de persecución y hostigamiento tendente a destruir a un determinado sector de la población, un grupo, sumamente heterogéneo, pero diferenciado. El grupo perseguido y hostigado lo formaban aquellos ciudadanos que no respondían al tipo prefijado por los promotores de la represión como propio del orden nuevo a instaurar en el país."*Auto de la Sala de lo Penal de la Audiencia Nacional confirmando la jurisdicción de España para conocer de los crímenes de genocidio y terrorismo cometidos durante la dictadura chilena.* Madrid, November 5, 1998, V.

[18] Article 6 of the Genocide Convention states: "Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."

[19] Audiencia Nacional, November 5, 1998. Available on the Internet at http://www.derechos.org/nizkor/chile/juicio/audi.html. Translation by Human Rights Watch.

The international warrant for Pinochet's arrested requested by Judge Garzón was delivered by Interpol to a London magistrate on October 16, 1998. The magistrate issued a provisional arrest warrant under the U.K. Extradition Act, following which General Pinochet was detained at the private clinic where he was recovering from back surgery.[20] A second magistrate issued another provisional warrant on October 22, based on five new charges tailored to British laws: "intentionally inflicting severe pain or suffering on another in the performance or purported performance of his official duties" (torture), conspiracy to commit torture, the taking of hostages, conspiracy to take hostages and conspiracy to commit murder in a [European Extradition] Convention country."[21] Many of the offenses were committed in Chile, but a number of the charges related to crimes or conspiracies taking place in Spain, Italy, France and elsewhere.[22]

This marked the first time a former foreign head of state had been detained in the United Kingdom for extradition on charges of grave human rights abuse in his own country. The guiding doctrine on the immunity of heads of states and diplomats has been traditionally based on an established norm of customary international law, the principle of state immunity (Act of State Doctrine). This recognizes that all states are sovereign and equal in international law and essentially restrains one state from sitting in judgment on the acts of another. State immunity in the United Kingdom is governed by the State Immunity Act of 1978, which extends to heads of state the provisions of the Diplomatic Privileges Act of 1964. It holds that heads of state or former heads of state are not accountable to British courts for crimes committed in pursuit of their official functions.[23]

[20]According to the warrant, it was alleged that Pinochet "between 11 September 1973 and 31 December 1983 within the jurisdiction of the Fifth Central Magistrate of the National Court of Madrid did murder Spanish citizens in Chile within the jurisdiction of the Government of Spain." First provisional warrant, dated October 16, 1998.

[21]A facsimile of the arrest warrant is published in Jaime Lagos.

[22]Extradition is the return of a wanted criminal from a country where s/he is found to the country where s/he is accused of (or has been convicted of) a criminal offense. In Britain it is governed by the 1989 Extradition Act and the European Convention on Extradition. The offences must be recognized as crimes in the U.K. punishable by a least twelve months in prison. If extradition is requested for extraterritorial crimes (acts committed outside the territory of the requesting state) they must also constitute extraterritorial crimes in the U.K. Once the fugitive has been arrested, the home secretary (equivalent to minister of the interior) must issue an "authority to proceed" before the case can go on to the next stage in the magistrates court, which examines the matter and decide whether to order extradition. British extradition law is intricate and considered one of the most exigent in Europe. The complex appeals procedure can extend for several years and the final decision whether or not to extradite is taken by the home secretary, who may base his decision on political and humanitarian considerations as well as purely legal ones.

[23]The Diplomatic Privileges Act enacts into British law the 1961 Vienna Convention on Diplomatic Relations and refers principally to heads of diplomatic missions. Article 31 of the State Immunity Act gives diplomats immunity from criminal proceedings. Article 39(2) governs the situation when the diplomat's term of office ends and indicates that immunity ends when s/he leaves the country but will continue with respect to official acts undertaken during the past term of office. A former head of state would therefore enjoy immunity for acts committed in an official capacity while in office, but not afterwards.

Four days after his arrest, General Pinochet's lawyers lodged *habeas corpus* appeals and moves for judicial review against the two provisional warrants against him. The High Court, presided by Lord Chief Justice Bingham, heard the appeals and evidence for the Crown Prosecution Service (CPS) acting on behalf of the government of Spain, on October 28.[24] The court overturned the first warrant on the grounds that the murder of nationals in other countries was not an extraditable crime under British law. Consideration of the second warrant turned on the interpretation of British extradition law, in particular its 1989 Extradition Act and the 1978 State Immunity Act. Lord Bingham ruled that Pinochet had immunity under British law as a former head of state for acts carried out as part of his official functions. There were no grounds, the court held, to make an exception to the doctrine of state immunity just because atrocious crimes were involved. Justice Graham Collins argued:

> The submission was made, as my Lord has indicated, that it could never be in the exercise of such functions to commit crimes as serious as those allegedly committed by the applicant. Unfortunately, history shows that it has indeed on occasions been state policy to exterminate or to oppress particular groups. One does not have to took very far back in history to see examples of that sort of thing having happened. There is in my judgment no justification for reading any limitation based on the nature of the crimes committed into the immunity which exists.[25]

The High Court allowed the Crown Prosecution Service to appeal and stayed an order for General Pinochet's release. He was moved under police guard from the clinic to a private psychiatric rehabilitation hospital in a north London suburb.

While the appeal was pending, the Spanish government submitted its formal request for extradition on November 11, greatly expanding on the list of offenses, which now included conspiracy to take over Chile by a coup and thereafter to commit genocide, murder, torture and hostage-taking. In addition, the Swiss and French Governments also submitted formal extradition requests on November 11 and 13 respectively and were subsequently joined by Belgium. Meanwhile Pinochet, whose medical treatment had long since been completed, left the hospital and was allowed to move to a rented house in Wentworth, Surrey, where he has since been held under house arrest.

The appeal was heard by five judges of Britain's highest court, the judicial committee of the House of Lords, on November 4 to 12. [26] They delivered their judgment on November 25. By three votes to two they held that Pinochet was *not* entitled to claim state immunity in respect of any of the crimes of which he was charged. Unusually, the House of Lords granted leave to intervene, jointly, to several U.K.-based organizations and individuals: Amnesty International, the Redress Trust, the Medical Foundation for the Care of Victims of Torture, Sheila Ann Cassidy (a British doctor who had been tortured in Chile), and the family of William Beausire (a Briton who "disappeared" in Chile in July 1975). Human Rights Watch was granted leave to intervene separately through written submissions. The court also arranged the appointment of a neutral jurist to act as *amicus curiae*.

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[24] The High Court of Justice (High Court) is an appellate court divided into three divisions: the Chancery Division, the Queen's Bench Division, and the Family Division. The Divisional Court, part of the Queen's Bench Division, hears appeals for judicial review or *habeas corpus* in criminal cases. It is composed of two or more judges and sits in London.

[25] Judgment, October 28, 1998.

[26] The House of Lords, the senior chamber of the British Parliament, is the highest court in the United Kingdom. Final appeals against court verdicts in civil and criminal cases are heard by a panel selected from a committee of twelve Law Lords, appointed for life (life peers). The judges were Lord Slynn of Hadley, Lord Lloyd of Berwick, Lord Nicholls of Birkenhead, Lord Steyn, and Lord Hoffmann.

The critical issue throughout the hearing was whether torture and the other crimes alleged could be considered to be official functions of a head of state and thus attract immunity. The Lords considered that they could not. In categorical language, Lord Nicholls stated:

> ... [I]nternational law has made plain that certain types of conduct, including torture and hostage-taking, are not acceptable conduct on the part of anyone. This applies as much to heads of state, or even more so, as it does to everyone else; the contrary conclusion would make a mockery of international law.

Lord Steyn agreed:

> ...[I]nternational law condemn[s] genocide, torture, hostage taking and crimes against humanity...as international crimes deserving of punishment. ...[I]t seems to me difficult to maintain that the commission of such high crimes may amount to acts performed in the functions of a Head of State.[27]

The Lords in the majority refused to consider arguments advanced by Pinochet about the effect of Britain's diplomatic relations with Chile, Pinochet's self-amnesty, and pending prosecutions in Chile. They argued that these were political matters for consideration by the home secretary.

On December 9, Home Secretary Jack Straw signed an order authorizing London magistrates to proceed. As noted, Straw had to consider not only the legal arguments, such as whether the offenses were extradition crimes, but also political ones, such as the effect of the decision on the stability of Chilean democracy and on the U.K. national interest. He rejected the charge of genocide as not satisfying the conditions of an extradition crime.

Elation in the pro-extradition camp at the House of Lords' decision was intense but short-lived. Pinochet's counsel lodged a petition to the Law Lords that the November 25 order be overturned on the grounds that one of the judges who had voted against Pinochet, Lord Hoffman, had undisclosed connections to Amnesty International, an intervenor in the case, giving the appearance of potential bias.[28] In a ruling unprecedented in British legal history, a hastily convened panel presided by Lord Browne-Wilkinson ruled unanimously on December 17 that it "reluctantly felt bound to set aside" the November 25 order, and called for a new hearing before a different panel.[29] The judges reasoned that, as an intervenor, Amnesty was in practice a party to the appeal. Applying the principle that no one may be a judge in his own cause, the judges held that Lord Hoffman was disqualified from sitting on the case.

The original appeal had, therefore, to be heard all over again, this time before a new set of seven judges, including four of those who had set aside the earlier decision.[30] Recourse to a panel of seven judges reflected the exceptional importance and complexity of the case. The hearings began on January 18, 1999 and lasted two weeks. The same intervenors were permitted to participate, but on this occasion they were joined by the Government of Chile arguing that state immunity should be upheld. Judgment was rendered on March 24. This time a panel of seven judges agreed by six to one that in principle General Pinochet was not entitled to claim state immunity.

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[27] *Judgments - Regina v. Bartle and the Commissioner of Police for the Metropolis and others EX Parte Pinochet (on appeal from a Divisional Court of the Queen's Bench Division). Regina v. Evans and another and the Commissioner of Police for the Metropolis and others EX Parte Pinochet (on appeal from a Divisional Court of the Queen's Bench Division).* Available on the Internet at http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990324/pino1.htm

[28] Lord Hoffman's wife was a member of AI's administrative staff, and Hoffman himself was a director of the group's charity division.

[29] *Judgment in Re Pinochet, Opinions of the Lords of Appeal,* December 17, 1998.

[30] Lord Browne-Wilkinson, Lord Hope, Lord Hutton, Lord Saville, Lord Millett, Lord Phillips, and Lord Goff.

The essence of the arguments set forth in Pinochet's defense had been summarized by Lord Slynn of Hadley, one of the dissenters from the first Law Lords verdict:

> It does not seem to me that it has been shown that there is any State practice or general consensus let alone a widely supported convention that all crimes against international law should be justiciable in National Courts on the basis of the universality of jurisdiction. Nor is there any jus cogens in respect of such breaches of international law which require that a claim of State or Head of State immunity, itself a well established principle of international law, should be overridden. [31]

In addition, the two Lords in the minority had clearly listened to Pinochet's arguments concerning pending prosecutions in Chile, though their decisions were not based on this point. In his opening paragraph, Lord Slynn stated: "In the course of 1998, eleven criminal suits have been brought against [Pinochet] in Chile in respect of such crimes."[32] Lord Lloyd also noted that Pinochet's alleged "crimes were the subject of a general amnesty in 1978, and subsequent scrutiny by the Commission of Truth and Reconciliation in 1990. The Supreme Court in Chile has ruled that in respect of at least some of these crimes the 1978 amnesty does not apply." [33]

Accordingly, Amnesty International and Human Rights Watch stressed that there was in fact no real prospect that Pinochet could be prosecuted in Chile, where overwhelming obstacles — including a military self-amnesty, Pinochet's immunity as senator-for-life, and the jurisdiction of military tribunals — insured his immunity. Human Rights Watch presented the Lords with a declaration to this effect by a leading Chilean jurist.[34]

The Lords voted to limit drastically the number of charges on which the former dictator could be extradited. They excluded extraterritorial murder (murder committed in countries other than Spain) as an extraditable offense and declared charges of hostage-taking or conspiracy to take hostages, although in principle extraditable under British law, inadmissable on the grounds that the nature and circumstances of the acts involved did not meet the specifications of the United Kingdom's 1982 Taking of Hostages Act.[35] The crux of the case, then, centered on the crime of torture and interpretation of the extraterritoriality provisions of the United Nations Convention Against Torture. Pinochet's lawyers, as well as the government of Chile, sought to discount the convention's requirement that states parties prosecute or extradite suspects found in their territories. As pointed out by Human Rights Watch in terms adopted by Lord Browne-Wilkinson, however, the very purpose of the convention was to introduce the principle *aut dedere aut judicare* — either you extradite or you try.

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[31] *Judgments - Regina v. Bartle and the Commissioner of Police for the Metropolis and others Ex Parte Pinochet.*

[32] Ibid.

[33] Ibid.

[34] Statement of Amb. Roberto Garretón, January 12,1999.

[35] "The statutory offense consists of taking and detaining a person (the hostage), so as to compel someone who is not the hostage to do or to abstain from doing some act. But the only conduct relating to hostages that is charged alleges that the person detained (the so-called hostage) was to be forced to do something by reason of threats to injure other non-hostages, which is the exact converse of the offense." Lord Browne-Wilkinson, *Judgment - Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet (On Appeal from a Divisional Court of the Queen's Bench Division),* March 24, 1999.

In a dramatic new interpretation of the extradition principle of "double criminality," the judges held that the alleged crimes had to be recognized as crimes in the U.K. *at the time they were committed.*[36] Thus, British courts could exert jurisdiction only in the few offenses of torture and conspiracy to torture which took place after September 29 1988, when the U.K. enacted Section 134 of the Criminal Justice Act, making torture an extraterritorial offense (that is, an offense punishable in the U.K. regardless of where it was committed or the nationality of the perpetrator).[37] This reduced the list of charges from over thirty to a mere handful of allegations of torture alleged to have been committed after this date. [38]

One member of the panel, Lord Millett, dissented from this drastic restriction of the charges. Citing Resolution 95 of the General Assembly of the United Nations in 1946, which unanimously affirmed the principles of the Charter of the Nuremberg Tribunal, Lord Millett contended that international jurisdiction over crimes against humanity already existed in international law before the Convention Against Torture was adopted.[39]

[36]Section 2 of the 1989 Extradition Act provides: (1)... "extradition crime means (a) conduct in the territory of a foreign state ...which if it occurred in the United Kingdom would constitute an offense punishable with imprisonment for a term of 12 months, or any greater punishment, and which...in the law of the foreign state...is so punishable under that law."

[37]This issue first arose in the High Court, where Pinochet's lawyers argued that extradition crimes had to have been crimes in the U.K. at the time that they were committed, not as of the date of the extradition request. The High Court had held that this was essentially a question for the extradition magistrate to consider. However, the court did state its view that the wording of the Extradition Act indicated that it was sufficient if the crimes were crimes in the U.K. *at the time of the extradition request*. Lord Lloyd, the only judge to address the issue in the November 1998 House of Lords ruling, had taken the same view.

[38]There were two critical dates which were repeatedly referred to in the judgment. Applying the new-style double criminality rule, the judges decided that, in respect of torture committed outside Spain, it was only those offenses carried out after September 29, 1988 which were extraditable. The second date was December 8, 1988**,** when the UK ratified the Convention against Torture. Since most of the judges relied on the terms of this convention in concluding that state immunity was not available, the majority of them decided that Pinochet's immunity was lifted only from this date when the UK became a state party. Spain and Chile were already parties to the convention by this time.

[39] "In my opinion, the systematic use of torture on a large scale and as an instrument of state policy had joined piracy, war crimes and crimes against peace as an international crime of universal jurisdiction well before 1984. I consider that it had done so by 1973. For my own part, therefore, I would hold that the courts of this country already possessed extraterritorial jurisdiction in respect of torture and conspiracy to torture on the scale of the charges in the present case and did not require the authority of statute to exercise it." *Judgment - Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet (On Appeal from a Divisional Court of the Queen's Bench Division*. Opinion of Lord Millett.

In his concluding comments, Lord Browne-Wilkinson noted that the drastically reduced number of extraditable charges would "obviously require" the home secretary to consider again the authority to proceed he had issued the previous December. Judge Garzón attached fifty-three new torture cases to the extradition request, all of them dating from October 8, 1988, to March 1990. In addition, he included 1,198 "disappearance" cases under the rubric of torture, on the grounds that the suffering caused to the relatives of the "disappeared" was a form of mental torture that continued unabated until the present. On April 15, after considering submissions from all the parties, Home Secretary Jack Straw issued his second authority to proceed.[40] In a carefully drafted statement, Straw explained that the remaining charges of torture and conspiracy to commit torture in the Crown's extradition request were sufficiently serious to warrant extradition on their own, and that Pinochet could not be returned to Chile since there had been no extradition request from the Chilean government.

Unlike the November 1998 decision of the House of Lords whose unequivocal defense of international accountability had electrified world opinion, the second decision was confusing and hard to interpret, causing perplexity in both the pro- and anti-Pinochet camps, both of which claimed it as a victory. Nevertheless, the vicissitudes of the British courts had a positive outcome. In the first place, the doctrine of state immunity, enemy number one of international accountability, had received a stunning defeat in two successive hearings in which nine out of twelve of Britain's most senior judges had rejected it. Second, the issue of extraterritorial jurisdiction had received a thorough and dispassionate examination. Extraterritoriality had been vindicated, strengthening the future effectiveness of the Convention Against Torture. Third, the quashing of the first Law Lords verdict and its confirmation by the second in respect of essential principles, enhanced the credibility of the proceedings against challenges of political bias.

Chile: a Custom-Made Safe Haven

Pinochet's October 1998 arrest hit an unsuspecting Chile like a bolt out of the blue. As army chief, Pinochet had made three discreet visits to London in earlier years, sometimes at the invitation of British Aerospace, whose ordnance division was under contract with the Chilean munitions company FAMAE. He gave himself time to enjoy the shopping opportunities and tourist sights of London, a city in which he liked to think of himself as a distinguished visitor. He had been well treated.[41]

Although the Castellón-Garzón investigations had been sporadically reported in the Chilean press during the year prior to Pinochet's arrest, the Chilean authorities believed that the Spanish judges had overstepped the limits of their jurisdiction. The trial would not prosper, they believed, because Spanish law does not permit trials *in absentia*, among other reasons. Chilean Foreign Minister José Miguel Insulza, Justice Minister María Soledad Larraín, and President Frei himself stated repeatedly that the Chilean government did not recognize the jurisdiction of the Spanish court. Considerable press coverage was given to the Spanish Public Ministry's opposition to the investigation. Its chief prosecutor, Eduardo Fungairiño, gave an exclusive interview to Chile's conservative establishment paper, *El Mercurio,* outlining his reasons. Little attention was given in Chile to the legal case advanced by the prosecution, except by low-circulation leftist publications.

[40] Evidence included a legal submission by the Chilean government against Spain's claim to jurisdiction, and arguments from Amnesty International and Human Rights Watch. The latter submitted a paper including 111 denunciations of torture during the period in question received from human rights sources in Chile.

[41] The London *Observer* noted: "In 1994, when Pinochet visited Britain under a Conservative government, he was greeted with honors and protection. British Aerospace showed him their multiple rocket launchers and the National Army Museum laid on a tour. Amnesty International tried to get the Major government to use its powers under the 1988 Criminal Justice Act to arrest him as a torturer, responsible for, among other crimes, systematic assaults on Sheila Cassidy, a British doctor. The Major administration dismissed the appeals instantly." "The arrest of an evil tyrant at last," *The Observer*, October 18, 1998. See also Rory Carroll, "The dictator with a fondness for Fortnum and Mason and a taste for the River Café," *The Guardian*, October 19, 1998.

Before Pinochet's arrest, Foreign Minister Insulza assured the Chilean public that the senator's diplomatic passport gave him immunity from being questioned by Spanish judges.[42] As Senate leader Andrés Zaldívar explained to the press two days after the arrest, "[T]he government has considered it prudent that Pinochet *always* travel with immunity, because it thinks that any legal situation that might arise should be resolved in Chile."[43] It was quickly evident that the passport provided no guarantee of immunity under British law since Pinochet was not officially accredited as a representative of the Chilean state. The passport had been issued expressly at the request of the army, as Insulza later admitted. [44]

The Chilean government's position was based, as already noted, on an assertion of territorial jurisdiction, the mutual recognition under international law of states' exclusive right to adjudicate crimes committed on their national territory. Under the terms of the Convention against Torture, moreover, states must either exercise jurisdiction themselves or allow subjects accused of torture to be tried elsewhere. Yet Chilean courts had failed to exercise jurisdiction in Pinochet's case, for which it was necessary first to end Pinochet's immunity from legal process in Chile.

Even following his return to civilian life in March 1998 after a quarter-century as Chile's supreme military leader, Pinochet has never been prosecuted by Chilean courts for any offense. No judge had even begun to investigate his responsibility for human rights crimes until January 12, 1998, when Appeals Court Judge Juan Guzmán Tapia began investigating a private accusation of genocide lodged against General Pinochet by Gladys Marín Millie, secretary-general of the Chilean Communist Party.[45] As we note below, the investigation of this and more than twenty other cases presented against Pinochet has now run for eighteen months without Pinochet being charged with any offense.

Apart from his revered status in the armed forces as former head of state and commander-in-chief,[46] Pinochet enjoys incalculable influence with his former military associates in the Senate and with leaders of the parliamentary opposition, many of whom served in his government. He still has influence in the highest echelons of the judiciary, some of whose senior members he appointed, although this influence has much diminished in recent years.

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[42]"De España solicitan interrogar a Pinochet," *El Mercurio* (Santiago), October 14, 1998.

[43]"Zaldívar: la razón de la defensa importa más que ofendido," *La Tercera* (Santiago), October 19, 1998.

[44]On May 15, 1999, Chileans learned that a circuit judge, Carlos Escobar, had ruled that the issue of the passport was a criminal offense for misrepresenting facts in a public document. A government clerk reportedly declared in the hearing that he had received instructions from the ministry of foreign affairs to add an inscription referring to Pinochet's special mission. "Sopresa por fallo sobre pasaporte de Pinochet," *El Mercurio*, May 16, 1999. Government statements suggest that Pinochet's supposed task as "ambassador extraordinary and plenipotentiary on special mission for the Republic of Chile" (*embajador extraordinario y plenipotenciario en misión especial del Gobierno de Chile)* was a fiction. In a letter to Home Secretary Jack Straw dated November 26, 1998, the Chilean government stated that the special mission was to pay a visit to Royal Ordnance. "Presentación de gobierno de Chile con relación a las 'autorizaciones para proceder' a la extraición," cited in Jaime Lagos Erazo, *El 'Caso Pinochet' ante las Cortes Británicas,* Santiago: Editorial Jurídica de Chile, 1999, pp 237-238, para 3. In May 1997, however, former President Patricio Aylwin visited Spain and was also given the rank of ambassador on special mission, to avoid his being subpoenaed as a witness before the Spanish judges. Paz Rojas, et al, *Pinochet ante la Justicia Española,* p. 20.

[45]See Chapter IV for information on the Guzmán investigations.

[46]On his retirement, the army awarded Pinochet a special honorific status as "Commander-in-Chief Benemeritus" (*Comandante en Jefe Benemérito*).

On March 10, 1998, Pinochet handed over his military command to his successor, Gen. Ricardo Izurieta, chosen by the government from the five most senior generals eligible, as the constitution requires.[47] On the following day he transferred his headquarters to the Chilean Senate, occupying a permanent position in government as a senator for life. Here he was to join a group of former military colleagues and cabinet ministers, who, like himself, occupied unelected seats and collectively exercised a veto on government-proposed legislation.

[47]Under Article 93 of the constitution not only is the elected president limited in the choice of candidates for top military posts, but he is also prevented from removing them during their four-year term of office except with the consent of the National Security Council.

Pinochet's parliamentary position gives him constitutional immunity as a member of Congress from arrest or criminal process. For him to be arrested or indicted, an appeals court must first cancel his immunity and suspend him from parliamentary office, a decision appealable to the Supreme Court.[48] As a senator, Pinochet also has privileges under the Law of State Security to take legal action against his detractors that could lead to their arrest or imprisonment if they make public criticisms deemed by the courts to be offensive.[49]

As former head of state, Pinochet is protected by the self-amnesty described at the beginning of this chapter, which covers the period from September 11, 1973 to March 10, 1978, when military repression and human rights violations were at their height. Unlike many of his subordinates, Pinochet has never applied for or been granted any benefit under the amnesty decree, since he has never been named as a defendant in any judicial proceedings. However, in the unlikely event that a criminal prosecution were to proceed, his lawyers would apply to the court to grant him immunity under the amnesty law without being required to stand trial. In its representations to Home Secretary Straw, the Chilean government denied that Pinochet was necessarily immune from prosecution under the amnesty, since the courts decide each case that comes before them on its own merits. While it is true that jurisprudence does not fix binding precedent in the Chilean legal system, in the twenty-one years the law has been in force the courts have not yet convicted anyone of a crime to which the amnesty is legally applicable, and an exception would scarcely be made in Pinochet's case.

Under the rules applying in Chile Pinochet, as head of the armed forces at the time of the commission of the crimes he is accused of, in all probability would be tried by a military court, composed of military officials previously under his command. Such a court would not offer guarantees of a fair and impartial hearing of the charges against him, in which the army would be a judge in its own cause. Appeals would be heard by the military appeals courts (Corte Marcial), only two of whose five members are civilians. A final appeal in the Supreme Court would be heard by the court's Penal Chamber (Sala Penal), on which the army auditor general (Pinochet's former army subordinate) would sit. Under current laws, military officials would also be responsible for the collection of evidence inside any police establishment or army installation.

Political circumstances, however, are much more likely to weigh here than legal ones. It is hard to imagine that an event as divisive as a trial of Pinochet would be allowed to occur. Indeed, Pinochet's immunity in the past has extended beyond human rights crimes to investigations of his business affairs and those of his family. In the early 1990s, government auditors were investigating Pinochet's son, Augusto Pinochet Hiriart, in an approximately U.S.$3 million case of alleged corruption involving a military-run business, known in Chile as the "Pinocheques affair." To halt the investigation, as well as due to other grievances, in May 1993 Pinochet sent combat troops into the street, creating the most serious civil-military incident since the return to civilian rule.[50] The Frei government called on the prosecutor's office to close the investigation in July 1995, citing national interest, and the case was subsequently closed.

[48]Constitution, Article 58.

[49]Article 6(b) of the Law of State Security makes it a criminal and imprisonable offense to "insult" authorities of state, including commanders-in-chief of the armed forces and senators. Using his army position, Pinochet has made frequent use of this law to silence his critics, both in the latter years of his government and throughout the 1990s. A motion is currently under debate in the Chilean Congress to repeal Article 6(b) and other articles of the Law of State Security that allow the confiscation of books and articles. For a full analysis and critique of this law, see Human Rights Watch, *The Limits of Tolerance: Freedom of Expression and the Public Debate in Chile,* (New York: Human Rights Watch, 1998,) pp. 48-53, 88-98).

[50]The incident, known in Chile as the *boinazo* for the berets (*boinas*) used by special troops, is described in Human Rights Watch/Americas, "Unsettled Business: Human Rights in Chile at the Start of the Frei Presidency," *A Human Rights Watch Short Report*, Vol. 6, No. 6, May 1994, p. 9, FN. 19.

The government firmly opposed other legislative investigations of Pinochet's actions aimed at unseating him in the Senate.[51] Former President Patricio Aylwin gave crucial evidence that helped block a parliamentary motion presented in January 1998 by leftist congress members calling for Pinochet's impeachment for the boizano and other similar incidents. President Frei and most of the Christian Democrats, the majority party in the government coalition, opposed the motion, which accused Pinochet of "gravely affecting the honor and security of the country." Any impeachment of Pinochet for his acts as head of state during the military government was ruled out by a decree he issued in the months before stepping down, which barred congressional investigation of events prior to March 11, 1990.[52]

[51] See Jon Lee Anderson, "Autumn of the Tyrant," *The New Yorker*, October 19, 1998.

[52] Law 18,918, the Ley Orgánica del Congreso, January 26, 1990.

The extradition proceedings due to begin in London on September 27, 1999, will examine Britain's obligations under the Convention Against Torture, as well as interpretations of the definition and scope of the acts that the convention applies to. Some of the key issues likely to come under scrutiny are discussed below.

Aut Dedere Aut Judicare

Under Article 5 of the Convention Against Torture, the United Kingdom is required to extradite an alleged perpetrator of torture who is present on its territory or to "submit the case to its competent authorities for the purpose of prosecution." Accordingly, the British government is not entitled to return Pinochet to Chile in the absence of a formal extradition request from that country. According to the Dutch chairman of the United Nations Working Group entrusted with drafting the convention, and the Swedish ambassador who prepared the convention's first draft, this article is:

> ... a cornerstone in the Convention, an essential purpose of which is to ensure that a torturer does not escape the consequences of his acts by going to another country. As with previous conventions against terrorism...the present Convention is also based on the principle *aut dedere aut punire*; in other words, the country where the suspected offender happens to be shall either extradite him for the purpose of prosecution or proceed against him on the basis of its own criminal law.[53]

The United Nations Committee Against Torture reminded Britain of these obligations in November 19, 1998. It recommended to the United Kingdom "that in the case of Senator Pinochet of Chile, the matter be referred to the office of the public prosecutor, with a view to examining the feasibility of and if appropriate initiating criminal proceedings in England, in the event that a decision is made not to extradite him. This would satisfy the State party's obligations under Articles 4 to 7 of the Convention and Article 27 of the Vienna Convention on the Law of Treaties of 1969."[54]

A Single Act of Torture is Enough

[53]J. Herman Burgers and Hans Danelius, *The United Nations Convention against Torture; A Handbook on the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment,* p. 131. Kluver Law International, August 1988.

[54]Concluding observations of the Committee Against Torture: United Kingdom of Great Britain and Northern Ireland, November 17, 1998. Cat/c/uk (concluding observations/ comments). Recommendations para.(f)

The fact that most of the charges against Pinochet have been ruled out by the Lords is not relevant to these obligations. As Lord Browne-Wilkinson pointed out, "A single act of official torture is 'torture' within the Convention." [55] In issuing his "authority to proceed," British Home Secretary Straw did not refer to other cases of torture during the period defined by the Lords, although dozens had been attached to the extradition petition by the CPS on behalf of Spain.[56] Nor did Straw refer to arguments and evidence submitted by nongovernmental organizations, including Human Rights Watch, which showed that torture continued to be a systematic practice during the final fifteen months of the military government. There is nothing in the Convention Against Torture to limit its application to multiple or systematic acts.

Torture as State Policy

The evidence against Pinochet will rest on his role in instigating, supervising, and defending a policy to torture. The new cases appended are relevant to establishing this high-level government complicity in torture since they help demonstrate a pattern of conduct emanating from top-level official commands.[57] The "conspiracy to commit torture" from 1988-90 was part of General Pinochet's wide-ranging plan to torture and eliminate political opponents which began in 1973. In the last years of Pinochet's rule, torture in Chile was systematic but more selective than in previous years. Principles of chain-of-command responsibility are the relevant standards from which to judge the criminality of Pinochet's actions. [58] This doctrine has been established in Article 86(2) of the Additional Protocol to the Geneva Conventions of August 12, 1949, and is invoked in Article 28 of the Rome Statute for an International Criminal Court, which Chile has signed. The verticality of the command structure in the Chilean armed forces has been commented on in, among other sources, recently declassified U.S. military intelligence documents. [59]

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[55] House of Lords: *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*. Available on the Internet at http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990324/pino2.htm

[56] As noted in Chapter II, Judge Garzón attached fifty-three new torture cases to the extradition request, all of them dating from October 8, 1988 to March 1990.

[57] As Lord Hope of Craighead pointed out: " [T]he case which is being made against Senator Pinochet by the Spanish judicial authorities is that each act of torture has to be seen in the context of a continuing conspiracy to commit torture. As a whole, the picture which is presented is of a conspiracy to commit widespread and systematic torture and murder in order to obtain control of the government and, having done so, maintain control of government by those means for as long as might be necessary.... [T]he fact that these [conspiracy] allegations remain available for the remainder of the period is important because of the light which they cast on the single act of torture alleged in charge 30. *Judgment - Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*.

[58] "In addition to rules of international criminal law on determining whether a former president or commander in chief of the armed forces of a country is criminally responsible for crimes under international law such as torture or conspiracy to torture, under long-settled principles of international criminal law, it is not necessary to prove beyond reasonable doubt that in any individual case the superior *ordered* the person concerned to be tortured. Indeed, it is not even necessary to prove that the president or commander in chief of the armed forces knew that the particular victim was tortured. What the prosecution must prove beyond a reasonable doubt is that the superior had a duty to exercise authority over subordinates, that the superior either knew the unlawful conduct was planned or carried out by the subordinate or had sufficient information to enable the superior to conclude that such conduct was planned or had occurred, and the superior failed to take necessary and feasible steps to prevent or punish the subordinate." Amnesty International, "Torture: an International Crime: Even one torture victim is too many." AI Index AMR 22/10/99, April 7, 1999.

[59] In February 1976, U.S. military intelligence agents observed prisoners being taken into an air force hangar for torture After a graphic description of how a prisoner "emerged from the building in obvious agony and rolled on the ground unable to stand", their report notes that the "proximity of interrogation building to Chilean AF transport group (group 10) strongly infer [sic] knowledge of such activity by unit commander. Further, Chilean military tendency to share responsibility up the chain of command suggests awareness by senior officers, as well." U.S. Department of Defense cable declassified on June 30, 1999.

Evidence that torture was used systematically against political opponents from 1973 to 1990 is readily available from reports of relevant United Nations bodies and the Inter-American Commission on Human Rights throughout the period.[60] The democratic Chilean government has itself noted the fact in reports submitted to the Committee Against Torture referring to human rights abuses under the military government.[61] The Rettig Commission reported in 1991:

> It can be stated with certainty that, during the final years of the military regime, the political structure that had been established by the enactment and implementation of the 1980 Constitution did not eliminate the national problem of serious and constant violations of human rights (although the frequency and numbers of victims admittedly declined). Indeed the 1978 amnesty, which its civilian promoters may well have regarded as the closing of the book on a now superseded problem, ultimately seemed to entail impunity for the past and promise impunity for the future.[62]

Contemporaneous reports issued by Human Rights Watch (then Americas Watch) and Amnesty International in 1989 during the last years of the Pinochet regime both concluded that torture continued to be implemented as government policy. Americas Watch reported:

> In the years since the plebiscite [of October 5, 1988], while the incidence of severe abuses of human rights has declined, quick resurgences at delicate moments *indicate that the apparatus of repression remains intact*; the level of politically-related violence and intimation in Chile remains disturbingly high, given the circumstances of a political opening; in short it is not possible to state that the policy of repression has been abandoned.[63]

In its April 1999 letter to Home Secretary Straw, Human Rights Watch appended details of 111 alleged acts of torture in the period from September 1988 to March 1990 involving the CNI, Carabineros and Investigaciones, respectively the uniformed and plainclothes divisions of the police. In over one-third of the cases, the use of electric shock torture, a hallmark of the military government, was alleged. This list has expanded as other cases became known.

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[60]See*, inter alia,* Ad Hoc Working Group on Chile, "Report on the Situation of Human Rights in Chile." A.G.UN, A/32/227, September 29, 1977, para 295; report of the Special Rapporteur on Chile, Abdoulaye Dieye, on the Situation of Human Rights in Chile, U.N., E/CN. 4/1428, January 28, 1988, para 86; report of Special Rapporteur Fernando Volio Jiménez, U.N. A/44/635, para 115; Inter-American Commission on Human Rights Annual Report for 1988 OEA/Ser-L/V/II.74 Doc., September 16, 1988; report of the Special Rapporteur on Torture, Sir Nigel Rodley, on his visit to Chile, E/CN.4/1996/Add.2 December 4, 1995. In this last report Rodley stated "a profound difference from that period [the military government] was the real commitment of the civilian Governments to human rights and, in particular to the need to eliminate the perpetration of torture or cruel, inhuman or degrading treatment or punishment by officials of the State" (para. 71).

[61]See the November 16, 1990 Addendum submitted by the democratic Government of Chile to the initial report to the Committee Against Torture presented by the Pinochet government on November 23, 1989, U.N. Doc. CAT/C/SR. Paras 40 and 41, and the later report submitted to the committee by Chile in February 1994, U.N. Doc. CAT/C20/Add. 3, para 6.

[62]Report of the National Commission on Truth and Reconciliation, Vol. 1, Part 2, A2, p. 71 of the English translation.

[63]Americas Watch, "Chile in Transition: Human Rights since the Plebiscite 1988-1999," *A Human Rights Watch Short Report*. p. 9, emphasis added. See also Amnesty International, "Chile: Reports of torture continue," AMR 22/07/89, February 1989, pp. 1-2. Amnesty International found that "torture continued in the last three months of 1988 in spite of the Chilean government's ratification of the United Nations Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment and the Inter-American Convention to Prevent and Punish Torture." Amnesty noted that for the first time some allegations were being investigated by the courts but that, "in some cases, these judges have faced sanctions by the Supreme Court, which has remained largely subservient to the military authorities, and also threats and other forms of intimidation by clandestine squads."

The Supreme Court appointed by Pinochet failed to enforce the constitutional prohibition of torture by ensuring that those responsible for it were brought to justice.[64] Absolute impunity prevailed. Even after April 1978, when torture was not covered by an amnesty decree, only a handful of courts undertook serious investigations, and there were only two convictions.[65] Some judges conscientiously pursuing human rights cases were intimidated by state agents, and the most persistent were reprimanded by their seniors in the Supreme Court. The effects of this systematic impunity may be irredeemable, as torture is subject to a five-year statute of limitations in Chile. Any torture charge relating to the period of the military government could now be impugned in Chilean courts as exempt from prosecution.

"Disappearance" as Torture

The supplement to the extradition request issued by Judge Garzón in April 1999 includes 1,198 acts of forced disappearance alleged to have been carried out under General Pinochet's orders. These are appended as extraditable crimes of torture committed in the relevant period from December 1988 to March 1990, on the grounds that the victims' continued "disappearance" causes mental anguish to both victim and relatives equivalent to torture and that torture is an inseparable element of the act itself. In effect, Garzón sustains, the crime of "disappearance" constitutes a continuing act of torture until the fate of the victim is known.

The U.N. Human Rights Committee, the European Court of Human Rights, and the Inter-American Court of Human Rights have all issued decisions on individual petitions that deal with the issue of "disappearances" amounting to possible acts of torture. [66] In an authoritative academic work, U.N. Special Rapporteur on Torture Sir Nigel Rodley recently concluded that "there is a trend towards recognizing that to make someone 'disappear' is a form of prohibited torture or ill-treatment, clearly as regards the relatives of the 'disappeared' person and, arguably, in respect of the 'disappeared' person him or herself."[67]

[64]Article 19 (1) of the 1980 constitution protects "the right to life and the physical and psychological integrity of the person."

[65]In December 1991 three former CNI agents were convicted for the death under torture of transport worker Mario Fernández López in October 1984. The handful of judges investigating torture cases included José Benquis Camhi and René García Villegas. Judge René García received death threats when investigating torture allegations against the CNI in 1986-1987.

[66]In *Quinteros v Uruguay*, the U.N. Human Rights Committee found that the mother of a "disappeared" woman, who suffered "anguish and stress...by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts," is "a victim of the violations of the Covenant on Civil and Political Rights, in particular of Article 7 [torture and cruel and inhuman treatment], suffered by her daughter" (107/1981, para.14). See also *El-Megreisi v Libya* (detainee, "by being subjected to prolonged incommunicado detention in an unknown location, is the victim of torture and cruel and inhuman treatment.") (Report of the Human Rights Committee, Vol.II, GAOR, 49th Session, Supplement 40 (1994) , Annex IX T, paras 2.1-2.5) *; Mojica v. Dominican Republic* ("the disappearance of persons is inseparably linked to treatment that amounts to a violation of Article 7") (449/1991, para 5.7). The European Court of Human Rights has also held that the extreme pain and suffering inflicted on the mother of the "disappeared" person violated Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms *(Kurt v. Turkey*, Eur. Ct. Hum. Rts, Case No.15/1997/799/1002, 25 May 1998, para.134). Similarly, the Inter-American Court of Human Rights, in the well-known case of *Velásquez Rodríguez*, held that "the mere subjugation of an individual to prolonged isolation and deprivation of communication is in itself cruel and inhuman treatment" (Inter-American Court H.R., Velásquez Rodríguez case, Judgment of July 29, 1988. Series C Nº 4, para.187).

[67]Nigel Rodley, *The Treatment of Prisoners in International Law*, (Oxford: Clarendon Press, 1999), p. 261.

Chile's Transition on Trial

Many commentators in Chile, Europe, and the United States considered that Pinochet's arrest had polarized Chilean society anew. Foreign observers witnessing protests by pro-Pinochet demonstrators in the streets of the upscale Las Condes district of Santiago were reminded of the bitter political atmosphere just before the 1973 military coup. Deep divisions in Chile's political elite over Pinochet's legacy rose to the surface, undoing at a stroke years of cooperation and bonding in the legislature and on business promotion trips abroad. Right-wing parliamentary leaders united with the business community in a unison of protest, claiming Pinochet to have been "kidnapped" (*secuestrado)* by the British government, victim of a conspiracy by the "socialist governments" of Europe. The army was unhappy and its hard-liners restless and angry with alleged government inaction.

Many Concertación leaders sincerely believed that Pinochet's arrest was wrong, while others who privately applauded it declined to say so publicly. Government policy on the case strained President Frei's Concertación government coalition almost to breaking point. The coalition survived thanks to an uneasy agreement with the Socialist Party, whose leaders had initially lobbied in London for the extradition and were immediately accused by the right of being part of the conspiracy. The party had been more deeply marked by the post-coup repression than any of its partners in the coalition: Pinochet's agents killed or "disappeared" hundreds of socialists, and many more were sent into exile. Evidently with little conviction, the party agreed to support government calls for Pinochet's return in exchange for a promise that government lawyers in London would not defend his immunity in the House of Lords but would base their arguments solely on the principle of territorial jurisdiction.

Pinochet's detention also highlighted the peculiar state of arrested development in which Chilean democracy found itself. President Frei openly recognized this in his May 1999 State of the Nation address, noting the "insufficiencies of our democracy."[68] After a decade of elected government, painfully little progress had been made to restore democratic rights to the importance they had enjoyed before the military takeover. Government leaders felt that Chile would have to do much more to fulfill its international obligations under international human rights law; it could not evade these obligations any more. As Socialist Party leader Ricardo Lagos expressed it, "The international community just handed us a yellow card." [69]

[68] "The insufficiencies of our democracy have become patent for all to see, and the drama of the 'disappeared,' whose whereabouts have remained unknown for more than twenty years, remains like an open sore in the national soul. The whole world knows this, and does not forget."
President Eduardo Frei Ruiz-Tagle, State of the Nation Address, May 21, 1999.

[69] A soccer referee's warning card displayed to an offending player.

Yet, at the same time that the government has claimed abroad that Chile would prosecute Pinochet, it has shrunk from taking steps, recommended by some members of the governing coalition, that would remove hurdles to Pinochet's prosecution in Chile. Those steps that it has proposed were no more than a gesture for international opinion and the government did not persist with them. Two measures it requested of the Supreme Court and the Council for the Defense of the State to support the investigations being conducted by Judge Juan Guzmán Tapia were rejected by these bodies, and the government did not pursue the matter. On November 11, 1998, Foreign Minister Insulza asked the Supreme Court to designate one of its members as a "special judge" to take over Guzmán's investigation, using a special dispension that allows investigations that affect Chile's international relations to be placed under a Supreme Court justice. [70] Insulza's request was prompted not by criticism of Guzmán but by the government's desire to show Britain that a serious investigation of Pinochet's criminal responsibility was underway in Chile. Ministers explained that if a Supreme Court justice were appointed it would not be possible for the case to be transferred to a military court if a prosecution went ahead. The Supreme Court, however, rejected this petition by a large majority. The progress of the investigation begun by Judge Guzmán remains, therefore, at risk of an eventual claim by the army for jurisdiction.

In another gesture to world opinion, in December 1998 the government requested the Council for the Defense of the State (Consejo de Defensa del Estado, CDE) to intervene as a party in the cases, as it had done in the Letelier trial.[71] This would have enabled government lawyers to contribute to and monitor the investigation, and intervene in the trial, as well as giving the case a higher political profile. The CDE took six months to reach a decision. On June 25, 1999, its president, Clara Szczaranski, announced that the CDE would not be a party to the "Caravan of Death" trial, a crucial part of Guzmán's investigation. The CDE statement gave no grounds for the decision and said nothing about the rest of the Pinochet investigation. The newspapers reported Szczaranski as "visibly avoiding the press."[72]

Taken together, the Supreme Court's decision and the CDE's announcement showed that both the judiciary and the CDE preferred not to raise the profile of the Guzmán investigation. That the government did not insist with its requests suggests that it was afraid of a negative military reaction. Another public climbdown such as occurred when President Frei ordered an end to the "Pinocheques" investigation for "reasons of state," would have been damaging to government prestige both at home and abroad.

There was even less room for negotiation on more radical measures, such as a law to interpret the amnesty to prevent its being invoked to prevent prosecutions, or limiting the jurisdiction of military courts. The rightist parliamentary opposition refused to discuss any legal reforms until Pinochet had been returned to Chile. Moreover, a consensus on either issue had not existed even prior to Pinochet's arrest. One government official stated openly that the reforms needed were against the unstated rules of the Chilean transition:

[70] In Article 7 of Law 19,047 of February 1991, the government of President Aylwin included a provision, tailored to the Letelier case, that "crimes affecting the international relations of the Republic with another state" could be placed directly under the Supreme Court, which might appoint one of its members to investigate. The provision is in Article 52 (2) of the Organic Code of Courts (Código Orgánico de Tribunales). Apart from the Letelier case, the law was used to authorize a Supreme Court judge to take over the investigation of the 1976 murder of United Nations official Carmelo Soria, a Spanish citizen, following insistent pressure by the Spanish government. As noted above, the case was later closed on application of the amnesty law and formed part of Judge Garzón's initial extradition request.

[71] The Council for the Defense of the State is an autonomous body that represents the public interest in both criminal and civil judicial proceedings.

[72] "Caravana de la Muerte: CDE no se hará parte," *La Tercera*, June 26, 1999.

> It is not that we want to guarantee impunity, *but the political system is constructed on the basis of accepting certain limits to the judicial process.* That is how it has been throughout the transition, which has had some dramatic experiences, like the case of the Pinocheques. There will be more such experiences tomorrow when the cases being handled by Judge Juan Guzmán advance.... There is an amnesty law, and there are difficulties in passing any law that does not have a high degree of consensus. Then there are the armed forces which have not yet recovered their strictly professional role, but instead sectors of them still feel partly committed to the past and also to the function provided to them under the present Constitution as guarantors of the institutional order. These are objective restrictions that are not changed in the slightest by declarations or good intentions, whatever their source.[73]

The limits that prevented justice from being achieved also applied to the exercise of political rights, which, as noted in Chapter I, are subject to stringent restrictions in the 1980 Constitution. The government's slender majority among elected senators (it has twenty seats against the opposition's eighteen) has meant that most proposals not based on a negotiated consensus taking into account the views of the nine appointed senators, have been either drastically watered down or abandoned.

The constitutional amendments needed to democratize the Senate require the support of three-fifths of both chambers of Congress. If the president is unable to command this support, the constitution does not allow him to hold a referendum to settle the issue (he is allowed to hold one only if he disagrees with a constitutional amendment proposed by Congress).[74] In his May 1999 State of the Nation address, President Frei announced that he would introduce a motion to reform the constitution so as to allow the president to hold a referendum under these circumstances. As of this writing, the proposal, introduced in June 1999, had gotten nowhere, due to opposition objections and lack of forceful advocacy by the government.[75] As the United Nations Human Rights Committee has observed in successive reports on Chile, the constitutional stalemate has frustrated the enjoyment of rights protected by international human rights treaties Chile has ratified.[76]

President Aylwin's minister of the presidency, Edgardo Boeninger, the most eminent Concertación strategist, has suggested that the government's reluctance to tackle the issue was not simply due to *force majeure*. "The essential responsibility of the government was to rebuild national coexistence, a concept that excluded efforts to impose the laws of the democratic victors, *even if they had had the parliamentary majority and the political*

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[73]Interview with President Frei's former secretary general of government, José Joaquín Brunner. Cony Stiptic, "Frei ha hecho exactamente lo que tenía que hacer," *Reportajes, La Tercera,* November 15, 1998. Italics added.

[74]Articles 117 and 119.

[75]"Urgencia para reforma sobre plebiscito," *El Mercurio,* August 27, 1999.

[76]In its examination of the report submitted by Chile under Article 40 of the International Covenant on Civil and Political Rights, the U.N. Human Rights Committee concluded:
"The constitutional arrangements made as part of the political agreement that facilitated the transition from the military dictatorship to democracy hinder full implementation of the Covenant by the State party. While appreciating the political background and dimensions of these arrangements, the Committee stresses that internal political constraints cannot serve as a justification for non-compliance by the State party with its international obligations under the Covenant." The committee stated that it was "deeply concerned by the enclaves of power retained by members of the former military regime. The powers accorded to the Senate to block initiatives adopted by the Congress and the powers exercised by the National Security Council, which exists alongside the Government, are incompatible with Article 25 of the Covenant. The composition of the Senate also impedes legal reforms that would enable the State party to comply more fully with its Covenant obligations." Concluding Observations of the Human Rights Committee : Chile. CCPR/C/79/Add.104, March 30, 1999 (Concluding Observations/Comments, 6 and 8).

force to do it."[77] By the same line of reasoning, both Boeninger and Aylwin thought the transition to democracy to be over, because the government's first objective, governability, had been achieved.

Events following Pinochet's arrest brought to the surface the deep political conflicts papered over by the Boeninger-Aylwin doctrine. Right-wing senators boycotted Congress for several days. In May 1999 an opposition party protest against Pinochet's detention was staged in parliament just before the president's State of the Nation address, during which protesters abruptly asked the British and Spanish ambassadors to leave. The protest ended in an on-camera scuffle, with punches thrown on both sides. The incident recalled an earlier one in March 1998, when Socialist Party senators greeted Pinochet in the Senate with placards carrying photographs of the "disappeared," as he was about to take his seat. The basic fault lines in Chilean politics were as deeply etched as ever. Chile still seemed to live in the shadow of the Cold War.

At the same time, under the surface, the Pinochet affair wrought important changes. These only became apparent in mid-1999, when the confrontational atmosphere during the London events had subsided and the country began to gear up for December 1999 presidential elections.

Minority Without a Voice: Press and Public Opinion

[77] Edgardo Boeninger, *Democracia en Chile* (Santiago: Editorial Andrés Bello, 1997), p. 431.

Contrary to the impressions of Chilean society given in the international press by images of flag-burning and fanatical pro-Pinochet demonstrators, a December 2, 1998 poll by the private MORI organization, showed that most Chileans were not unduly perturbed by Pinochet's arrest. Seventy-one percent said that their lives were unaffected, and 66 percent said that democracy was not in danger. Forty-four percent thought that Pinochet's arrest was a good thing; 45 percent thought it bad. Nearly two-thirds thought Pinochet guilty of crimes. Fifty-seven percent thought that it would be best for the country if he were tried, and only 29 percent thought that he should not be tried.[78]

This survey did not bear out one of the more potent government arguments for Pinochet's return to Chile, namely that by arresting him the U.K. had gravely upset the delicate balance of the Chilean transition, reopened old wounds, and re-polarized Chilean society. The MORI poll showed that more than half the Chilean population believed that Pinochet should answer for his crimes, but Chileans did not seem to associate the event with crisis or threat to their personal lives. A survey published in *Qué Pasa* magazine two weeks later reached similar conclusions. Forty-one percent were in agreement with Pinochet's arrest, 56 percent thought that he was solely or mainly responsible for human rights violations under the military government, and 59 percent wanted him tried by Chilean courts. Yet the issue was placed fourth in a rank of "important issues" and was considered personally unimportant by nearly half the sample.[79] In a third survey published in April 1999, 72 percent wanted Pinochet tried, either in Chile or London.[80] Ordinary people seemed to see the events less emotionally than the Chilean political elite.

[78]"Caso Pinochet no afecta apoyos presidenciales," *El Mercurio,* December 3, 1998; and Margaret Valenzuela, "Chilenos sienten que no les afecta caso Pinochet," *La Tercera,* December 3, 1998.

[79]"Las cifras de la crisis Pinochet," *Qué Pasa* (Santiago), December 19, 1998.

[80]Conducted by the Center for the Study of Contemporary Reality (Centro de Estudios de la Realidad Contemporánea, CERC), reported in *La Tercera,* April 20, 1999.

With Pinochet's arrest, human rights received the first significant coverage in the Chilean press for years. However, the views of the 30 percent who appear consistently in surveys favoring Pinochet's extradition and trial in Spain found scant expression in the print media, which ironically have become increasingly unrepresentative of the full range of opinion in Chilean society since the return to civilian rule. Since 1990, two newspapers and three weekly news magazines that articulated anti-Pinochet views under the dictatorship have folded, as foreign funding dried up and market pressures took over. [81] Editorial comment in the two major dailies, *El Mercurio* and *La Tercera*, overwhelmingly supported either Pinochet or Chile's sovereignty claim. No mass circulation newspaper or political weekly celebrated the arrest or the Lords' decision — or presented international law arguments in its defense — a marked contrast with the European press in which both sides got a vigorous airing.[82] The Internet continued to be a lifeline to those in search of alternative viewpoints. Even anti-Pinochet jokes, traditionally a rich vein of humor during the military government, were exiled to cyberspace, an example being the sardonic cartoons of Guillo.[83] A satirical broadsheet, *The Clinic (La Clínica),* said to be linked to youth sections of the Party for Democracy and the Socialist Party, was launched and distributed free, *samizdat*-fashion. *The Clinic* poked fun at Concertación leaders as well as at Pinochet. But, as *La Tercera* journalist Gazi Jalil wrote:

> ...no one wants to be publicly involved. Nobody signs the stories. No one figures as the director in charge. No one is a spokesman. To mock the politicians they do it in clandestinity, the best place to escape the mountain of lawsuits that would result and the doors that would slam against those who want to play wiseguy.[84]

Acerbic essays on the Pinochet case that were unpublishable in the press appeared in book form. Many took the form of "open letters" to various public figures, a new genre started by playwright Marco Antonio de la Parra in his *Open Letter to Pinochet* (*Carta Abierta a Pinochet)* published in 1998. In August 1999, Patricia Lutz published a thinly-disguised *roman a clef* about the mysterious circumstances in which her father, Gen. Augusto Lutz, an opponent of Pinochet and the DINA, died of septicemia in the Military Hospital after a series of medical errors, in November 1974. [85]

Although not related directly to the Pinochet case, the banning of journalist Alejandra Matus's *Black Book of Chilean Justice (Libro Negro de la Justicia Chilena)* demonstrated the continuing failure of Chilean judges to uphold freedom of expression. Santiago Appeals Court Judge Rafael Huerta ordered police to remove the book from circulation within hours of its April 13, 1999 launch, following a criminal complaint lodged against the author by Supreme Court Justice Servando Jordán. Matus's book, the product of eight years' experience as a court

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[81]Daily newspapers *El Fortín Mapocho* and *La Epoca* closed in 1990 and 1998 respectively; weeklies *Cauce, Análisis* and *APSI* folded in the early years of the Aylwin administration. The Christian Democrat-inclined *Hoy* closed down in October, 1998.

[82]In 1999 a new daily newspaper, *El Metropolitano*, was launched, independent of the two chains that dominate the Chilean print media, El Mercurio and Copesa, owners of *La Tercera*. Hopes that *El Metropolitano* might establish new standards of independent reporting were dashed when management fired its political director and two other senior professional staff for refusing to modify a piece about the military coup due for publication on September 11, titled "The Forgotten Stars of the Coup." The article was a profile of army generals who reportedly persuaded Pinochet to embark on the coup; managers representing the owners, Hites department stores, objected to this focus. Eleven editors of the paper resigned in sympathy with their colleagues. "Remezón en el Metropolitano por despido de directores,"*La Tercera*, September 15, 1999.

[83]The cartoons are posted weekly on www.guillo.cl.

[84]Gazi Jalil, "La Izquierda sin censura," *Reportajes, La Tercera,* February 28, 1999.

[85]Patricia Lutz, *Años de Viento Sucio (Years of Dirty Wind)*, (Santiago: Planeta, 1999). Lutz's sister Olga gave evidence to Judge Garzón in Spain.

reporter, was an exposé of venality and improper conduct in the upper echelons of the judiciary. It included sharp criticism of the Supreme Court's failure to investigate human rights violations under the military government. Matus was accused of offenses under the State Security Law, which prohibits criticism deemed offensive to government authorities. She had to leave Chile on the first available flight to Buenos Aires to avoid arrest, cutting short her promotion of the book. On June 16, police detained Bartolo Ortíz, manager of the publishing house Planeta, and Carlos Orellano, its editor, and charged them with the same offenses, under a legal norm that make publishers responsible if the author is not available to be charged. They were held for two days in Capuchinos prison until released on bail. Two prominent television personalities who read or displayed sections of the book on television were called to give evidence. Matus, who is now in the United States, faces arrest if she returns to Chile. On September 30, 1999, she was granted political asylum in the U.S.

After learning of Ortiz and Orellano's detention, the Special Rapporteur on Freedom of Expression of the Organization of American States, Santiago Cantón, visited Chile on June 23, advancing an official visit planned for August. The rapporteur said he considered the legal limitations on freedom of expression in Chile to be serious and that the court's action in the *Black Book* case violated the prohibition of prior censorship in the Chilean constitution as well as in Article 13 of the American Convention on Human Rights.[86] The case is currently before the Inter-American Commission on Human Rights. In two cases of prior censorship in which the commission had declared Chile to have violated Article 13 of the American Convention (the cases of Francisco Martorell's book *Impunidad Diplomática* and Martin Scorsese's film *The Last Temptation of Christ*), the Chilean government has failed to implement the commission's recommendations ordering bans against both lifted.

In a prophetic introduction to *The Black Book,* Matus described receiving a telephone call from a colleague asking her for permission to print extracts from the book in a pre-publication notice for his newspaper, *La Tercera.* Their conversation, she wrote, "served to revive in my mind apprehensions about the risks we were running [both publishers and author] for the sole reason of making public facts that, although substantiated and checked, are certainly going to embarrass the protagonists. And what a contrast this reality seems when I compare it to other democratic countries, where there are no obstacles to criticizing authorities, or even laughing at them, in the media, without the journalist or writer ending up in jail." [87]

Article 6(b) of the State Security Law (Ley de Seguridad Interior del Estado) punishes those who "defame, libel or calumniate" the president, government ministers, parliamentarians, senior judges, and the commanders-in-chief of the armed forces. The maximum sentence for this offense is five years' imprisonment. Under Article 30 of the law, the judge is required to "collect and place at the disposal of the court printed matter, books, pamphlets, records or tapes or any other object which may appear to have been used to commit the crime."

The offense of contempt of authority is classified legally as an attack on "public order," and court precedent over many years has held that the damage to public order follows from the verbal expressions used and does not require to be proven for the prosecution to be upheld. By following this doctrine, the courts have evaded the crucial job of establishing that public order was in fact damaged or threatened by an offensive expression, or that the restriction imposed was legitimate and necessary. Not only are prison sentences higher than those prescribed for libel in the ordinary criminal code, but establishment of innocence is more difficult, since courts have repeatedly ruled that the truth of the impugned expressions is not a legitimate defense.[88]

[86]Jazmín Jalilie, "Relator OEA califica como grave la censura en Chile," *La Tercera,* June 24, 1999.

[87]Alexandra Matus, *El Libro Negro de la Justicia Chilena,* (Santiago: Planeta, 1999,) p.11-12 (available only in photocopy, pirated edition, and, for a time, on the Internet at www.tercera.com/libronegro). Translation by Human Rights Watch.

[88] For a full analysis and critique of this law, see Human Rights Watch, *The Limits of Tolerance,* pp. 48-53, 88-98.

With its origins in the nineteenth century, this contempt for authority law has been invoked from 1958 to the present. At least fifteen journalists and eight politicians, including several governing coalition parliamentarians, have been charged since 1990 under Article 6(b) of the law. These prosecutions include several initiated by Supreme Court judges. In 1995, Congress, with the evident sympathy of the Frei government, filed charges against a former Pinochet minister, Francisco Javier Cuadra, for comments in a magazine interview they considered offensive to the parliament's "institutional honor." Cuadra was given a 540-day suspended prison sentence.

One of the many suits Pinochet filed under the law resulted in the October 1996 arrest of the general secretary of the Communist Party, Gladys Marín, for a speech commemorating the "disappeared" in which she said that Pinochet was "the main person responsible for state terrorism." After the case was reported widely in the international press, Defense Minister Edmundo Pérez Yoma persuaded Pinochet to withdraw the accusation. Socialist Party Sen. José Antonio Viera-Gallo barely escaped prosecution in 1997 for a remark made on a television panel and considered offensive by General Pinochet. Pinochet withdrew the suit after Viera-Gallo accepted a proposal by Pérez Yoma, involving his "explanation" of his comments to the army representative, Gen. Rafael Villaroel.[89]

The Matus book, however, broke new ground: it was the first time since the return of democracy that the law had been invoked to censor a book. This time no prominent politician of any party spoke up in defense of Jordán's action. The president of the Supreme Court considered that it brought the judiciary into disrepute. On April 20, a group of Concertación legislators presented a bill to the Chamber of Deputies eliminating Article 30, and most, but not all of the provisions of Article 6(b). It was the first bill ever proposed to tackle this law, which for years has set limits to press freedom as well as public criticism of high officials.

At this writing the bill has been passed in committee, but has been amended in such a way as to incorporate the essence of the State Security Law provisions into the ordinary penal code. Apart from modifying Article 6(b) of the law and abolishing equivalent provisions in the penal code[90] — both positive measures — the text agreed in committee proposed to amend Article 429 of the penal code, which refers to libel and defamation of government authorities. The amendment would make this a particularly grave form of libel, precisely the kind of discriminatory provision in favor of government authorities and at the expense of the ordinary citizen that the bill was intended to abolish. Unless this amendment is rejected, then, there is a danger that the crime of defamation may be smuggled back into the ordinary libel laws.[91] If the bill is not passed in its original form before the end of the Frei administration, it will join a list of other reforms seeking to expand freedom of expression that have been stalled in Congress for years. They include a comprehensive press law increasing legal protection of journalists, first presented in 1993, a constitutional reform abolishing film censorship, and a freedom of information law.

Pressure for Compromise

On May 30, veteran Socialist leader Ricardo Lagos Escobar was chosen in the Concertación presidential primary as the coalition's presidential candidate for the December 1999 elections. Lagos will run against Joaquín

[89]Ibid, pp. 88-98.

[90]Articles 263-265 of the Penal Code deal with defamation of government authorities, disruption of the proceedings of Congress and the courts, as well as threats and insulting expressions directed at legislators and judges. The wording of Article 263 is similar to that of Article 6(b) of the State Security Law.

[91]See Felipe González Morales, "Informe ampliado sobre el proyecto que modifica la Ley 12.927," Programa de Acciones de Interés Público, Centro de Investigaciones Jurídicas, Universidad Diego Portales, September 1999, pp.19-20.

Lavín, former mayor of Santiago's wealthy Las Condes district and candidate for the opposition bloc, Alliance for Chile (Alianza por Chile).[92]

[92]The opposition bloc is composed of two conservative parties ─ National Renovation (Renovación Nacional, RN) and the Independent Democratic Union (Unión Democrática Independiente, UDI). UDI's founder, Jaime Guzmán Errázuriz, was Pinochet's political advisor and one of the authors of the 1980 constitution.

Neither bloc appears interested in adopting confrontational politics on human rights. Considerable effort has been expended in the search for the elusive formula which would bridge the divide on the justice issue, described later in this chapter. In this process, Lavín is expected to distance himself from Pinochet, just as Socialist leaders will be encouraged to moderate their demands for justice in the interest of "governability." Privately, leaders from both sides admitted that Chilean democracy was better off with Pinochet in London. If Pinochet had been divisive in his absence, he would be even more so on his return. [93] Former Foreign Minister Insulza said as much in an interview with the Spanish newspaper *El País*, provoking an immediate official complaint from the armed forces to then-Minister of Defense José Florencio Guzmán. This unofficial view changed significantly when Pinochet's health deteriorated in September, provoking fears of a "martyr syndrome" should Pinochet die in captivity abroad.

The official stance remained resolutely opposed to Pinochet's prosecution outside Chile. In late December Insulza wrote to U.N. Secretary-General Kofi Annan expressing concern at "the disregard of international law in force and the purposes and principles of the United Nations Charter, and the potential creation of a grave precedent in the friendly relation among states."[94] Current Foreign Minister Juan Gabriel Valdés took this rhetoric a stage further in September 1999 when, angered by Spanish Foreign Minister Abel Matute's rejection of a Chilean proposal to seek arbitration in the dispute, he accused European nations of a pretentious and arrogant attempt to "tell us how and when we should conclude our transition," satirizing Judge Garzón as an "international avenger" (*justiciero internacional*) who had taken it upon himself to judge what happened in Latin America as a result of the Cold War.[95] Likewise, the Chilean judiciary has refused to respond to requests for information from the Spanish court. Chief Justice Robert Dávila publicly stated, "Chilean sovereignty has been trampled on" following the first Lords ruling. [96] In the 1999 judicial year inauguration ceremony on March 1, 1999, Justice Dávila said that an "adverse sentence of the Lords in the case that concerns us would be the most serious rupture that the present international legal order could suffer in the final days of the millennium. It would mean the end of the principle of equality between States."[97] He also made it clear that unless there was a change in Chilean legislation, the amnesty law had to be applied and the Chilean courts' rulings respected.

The Amnesty Law: A Bone of Contention

The amnesty law remains the single most important legal obstacle to human rights trials in Chile. In recent years, international consensus has moved toward an unequivocal condemnation of amnesty laws that prevent the investigation and punishment of crimes against humanity.[98] Both the U.N. Human Rights Committee and the Inter-

[93]According to Sen. Edgardo Boeninger, "The most problematic scenario for the Concertación would present itself if General Pinochet returns to Chile. In my opinion, what will occur is that demands will increase that justice be done here." Francisco Dagnino, "Las recetas de Boeninger en el caso Pinochet, *La Tercera,* February 22, 1999. Translation by Human Rights Watch. See also "Chile's right in the shadow of an embarrassing old general," *The Economist* (London), August 14, 1999.

[94]"Caso Pinochet, preparan una nueva protesta internacional," *La Tercera,* January 2, 1999.

[95]"Chile rechaza juicio Europeo a transición," *El Mercurio*, September 24, 1999.

[96]José Ale, "Dávila: 'Se ha pisoteado nuestra soberanía'," *La Tercera,* December 2, 1999.

[97]"Dávila abogó por liberación de Pinochet," *El Mercurio,* March 2, 1999.

[98]In its General Observation No. 20, the U.N. Human Rights Committee found amnesty laws like the Chilean to be generally incompatible with states' obligations under the ICCPR to guarantee that persons under its jurisdiction are not subject to violations of the covenant, to investigate such violations that occur, and to ensure that similar violations are not committed in the future. The Human Rights Committee reached the same conclusion in at least six complaints it has examined in Peru, France, Uruguay, Argentina, and El Salvador.

American Commission on Human Rights of the Organization of American States have declared Chile's amnesty law to be incompatible with Chile's international human rights obligations.[99]

[99]In March 1999, the Human Rights Committee, in its consideration of Chile's report on its observation of the International Covenant on Civil and Political Rights, noted that the amnesty law prevented the state from fulfilling its obligations under Article 2 (3) of the Covenant to guarantee effective reparation to any person whose rights and freedoms had been violated. In 1996 and again in 1998, the Inter-American Commission on Human Rights found that the Chilean amnesty decree violated the terms of the American Convention on Human Rights. Indeed, the commission chastised the elected governments for having failed to eliminate the decree from the books. Inter-American Commission on Human Rights, Report No. 36/96, October 15, 1996, and Report No. 25/98, March 2, 1998

In Chile, however, the law is viewed by all of the political parties in Congress ─ even those that reject it on principle ─ as an unchangeable part of the Pinochet legacy. Only the extraparliamentary left still advocates the Concertación's 1998 electoral promise to annul or repeal the law. [100] The government believes this to be legally impossible, as well as politically unviable. Nor has it supported any parliamentary motion to interpret the law. At least three minority bills to exclude crimes against humanity from its scope have already failed for lack of government support. In June 1998, for example, an announcement by the Socialist Party that it was introducing a law to exclude crimes against humanity from the amnesty law led to an immediate counter-proposal from the two principal opposition parties, UDI and RN, which would effectively close the door to any prosecutions based on human rights abuses that took place under military rule. Explaining the government's lack of support for the Socialist initiative, Secretary General of Government José Joaquín Brunner said that the political-legal situation continued to make it impossible to revisit the amnesty issue. [101] In short, the advances in human rights trials summarized below are due more to legal interpretation by the courts than the actions of the government.

Trials in other countries

As noted in Chapter I, the Letelier-Moffitt assassination is the only crime committed in the period covered by the amnesty law for which perpetrators have been convicted by Chilean courts. Other crimes attributed to DINA agents in the context of Operation Condor have been investigated, or are under investigation, by courts in other countries, including Argentina, Italy, Uruguay, and the U.S.

These include the September 1974 car-bomb assassination of retired army commander Gen. Carlos Prats González and his wife Sofía Cuthbert in Buenos Aires, for which a former DINA operative, Enrique Arancibia Clavel, has been charged and is in detention in Buenos Aires. In April 1999, the attorney representing the Prats family, Pamela Pereira, requested the investigating judge, María Servini de Cubría, to issue charges against Pinochet and senior DINA officers implicated in the crime, including the chief of its "foreign department," Brig. Raúl Iturrriaga Neumann. Judge Servini has received assistance in the United States from the Federal Bureau of Investigation and has been given access to documentation on the Letelier case, as well as permission to interview two convicts in the U.S. under federal witness protection.

[100] The Concertación's 1989 electoral program stated: "By its own juridical nature and true sense and scope, the Amnesty Law of 1978 has not been, nor may be, an impediment for the establishment of the truth, investigation of the facts or the determination of criminal responsibility and consequent sanctions in cases of crimes against human rights, like detentions followed by disappearance, crimes against life and grave physical and psychological injury. The democratic government will promote the derogation or annulment of the Amnesty Decree Law." Concertación de Partidos por la Democracia, "Program of Government," published by *La Epoca* newspaper company, 1989. Translation by Human Rights Watch.

[101] "Brunner: no hay condiciones," *La Tercera*, July 4, 1998.

Investigation by Uruguayan courts of the mysterious 1993 murder of DINA chemist Enrique Berrios in Uruguay abruptly terminated in November 1998, when Judge Alvaro González filed the case away as an "unclarified crime." Although closed investigations are in the public domain in Uruguay, Judge González refused public access to the dossier on the grounds that the security of witnesses could be compromised. With the assistance of a former DINA colleague, Berrios had left Chile for Montevideo in 1991 to escape questioning in the Letelier case. He went missing after a vain attempt to escape his "minders," said to be members of Uruguayan military intelligence. Berrios was implicated in the murder of U.N. diplomat and Spanish citizen Carmelo Soria and was known to have worked on the production of the chemical agent Sarin, believed to have been manufactured by the DINA for political assassinations.[102]

A high-profile case in which further action is required of both the Chilean and Italian governments to ensure justice is that of former Christian Democrat leader Bernardo Leighton and his wife Anita Fresno. Leighton, minister of interior during the Frei Montalva administration in the 1960s,[103] was in exile during the military regime undertaking initiatives to establish coordination between the Christian Democratic Party and the left when he and his wife were victims of a near-fatal shooting in Rome on October 6, 1975, carried out by an Italian neo-fascist gunman acting on DINA orders.

In June 1995, following a thorough investigation, an Italian judge convicted former Gen. Manuel Contreras and former Brig. Raúl Iturriaga of DINA *in absentia* as intellectual authors of the attempted murder of Leighton and Fresno, sentencing them to twenty and eighteen years of imprisonment, respectively. A higher tribunal confirmed this sentence in July 1996.[104] The Chilean government, which was a party in the Italian case, welcomed the verdict in a press conference held by then Deputy Secretary General of Government Edgardo Riveros. Chile's ambassador in Italy also welcomed it.[105] Despite these statements, neither Chile nor Italy has taken further action to implement the sentence. Although no extradition treaty exists between Chile and Italy, according to international law this does not prevent Chile from sending Contreras and Iturriaga to serve their sentences in Italy. In August 1999, Human Rights Watch sent a letter to the officer in charge of extradition proceedings at the Ministry of Foreign Affairs of Italy requesting information about the current status of the case. At this writing, no response has been received from the Italian government.

Unlocking the amnesty law

[102] Vicariate of Solidarity Documentation Center and Archive (Fundación Documentación y Archivo de la Vicaría de la Solidaridad), *Informe de Derechos Humanos del Primer Semestre de 1999,* pp. 16-18. For background on the Berrios case, see Human Rights Watch, "Unsettled Business: Human Rights in Chile at the Start of the Frei Presidency," *A Human Rights Watch Short Report,* vol. 6, no. 6, May 1994, pp. 19-20.

[103] President Eduardo Frei Montalva was the father of Eduardo Frei Ruiz-Tagle, current president of Chile.

[104] General Contreras, currently serving a seven-year sentence in Chile for the Letelier-Moffitt assassination, is expected to be released from prison at the latest in 2002. Brigadier Iturriaga is at liberty in Chile.

[105] "Gobierno satisfecho," *La Nación* (Santiago), June 24, 1995.

Of the 3,197 fatal victims of the military junta whose cases were documented by the Rettig Commission, the fate of hundreds may never be clarified by Chilean courts.[106] During the military government, courts generally applied the amnesty decree automatically without regard to the stage reached in the investigation.[107] In the last six months of the Pinochet regime the military judge of Santiago closed for good more than thirty dormant cases. When the closures were appealed, the military appeals courts endorsed the closure except in a handful of cases. The Supreme Court, most of whose members had been appointed by Pinochet, declared the amnesty law to be constitutional in August 1990, discarding the principles of human rights treaties Chile had signed.

The court held that the amnesty decree was limited neither by international humanitarian law nor by human rights norms. For example, it considered that the Geneva Conventions of 1949, which were published in Chile in the Official Gazette on April 17-20, 1951, did not apply because no state of war existed after the coup. As a description of the facts this was true: the military government faced no armed opposition during most of the period in which the amnesty law was in force. Nevertheless a wartime state of exception, declared by the new rulers to stamp out opposition, was in force: on the day after the coup the military junta passed a decree (Decree No. 5 of September 12, 1973) that declared a state of siege tantamount to a "state or time of war," and mandated the passage of death sentences by military "war tribunals" (*consejos de guerra)* without elementary guarantees of due process. The Supreme Court itself repeatedly cited this decree to justify its refusal to review sentences passed by these tribunals. In short, the state of war allowed exceptional rigor in the pursuit of the regime's opponents, but deprived the victims of protection under humanitarian norms that apply to internal conflicts.

The court insisted that principles of international human rights law were not binding for the Chilean government either. It held that Chile's obligations under the ICCPR were not in force, since although Chile ratified the covenant on February 10, 1972, the promulgation decree, which dates from November 30, 1976, was not published in the Official Gazette until 1989.[108]

Case closures have been promoted by the fact that the general auditor of the armed forces still has a seat on all Supreme Court panels dealing with cases under military jurisdiction. Throughout his tenure as general auditor, Gen. Fernando Torres Silva used these powers to the full. [109] A bill to remove the general auditor from the court, proposed by the Concertación in August 1998, still awaits a vote in both houses.

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[106] Two hundred and sixty-one victims, in more than eighty cases, are involved, according to estimates provided to Human Rights Watch by the Vicariate of Solidarity Archive.

[107] The treatment of Santiago Appeals Court Judge Carlos Cerda Fernández, who was suspended on half pay in 1986 for refusing to close an incomplete investigation, marked one of the most shameful episodes in the history of the Chilean judiciary. Cerda escaped expulsion from the judiciary in 1991 only after a personal plea of clemency to the Supreme Court and an international campaign on his behalf. Human Rights Watch (then Americas Watch) documented the case extensively in *The Politics of Agreements,* pp. 46-48, and in several earlier reports. See also the International Commission of Jurists, *Chile: a Time of Reckoning, Human Rights and the Judiciary,* (Geneva: ICJ, September, 1992), pp. 101-104; Alejandra Matus, *El Libro Negro de la Justicia Chilena,* (Santiago: Planeta, 1999), pp. 47-54.

[108]See John A. Detzner, *Tribunales Chilenos y Derecho Internacional de Derechos Humanos,* Chilean Commission of Human Rights (Comisión Chilena de Derechos Humanos), Santiago, June 1988, pp. 59-74.

[109] Using the criteria applied by the House of Lords in the Hoffman case, scores of Supreme Court decisions in which General Torres voted for closing human rights cases undoubtedly would have to be set aside and reviewed. General Torres, a close Pinochet confidante, abruptly resigned in April 1999 for "personal" reasons, although he was widely believed to have left in disgrace for his failure to halt the Pinochet prosecution or to stem the flow of human rights cases through the courts. Following a mission to Chile in March 1987, Human Rights Watch (then Americas Watch) concluded that Torres repeatedly abused his authority as a military prosecutor by subjecting security detainees to long periods of incommunicado detention following their torture by CNI and police agents, to which he turned a blind eye. Torres is now facing criminal complaints lodged by several of his victims. See Americas Watch, *Chile: Human Rights and the Plebiscite,* pp. 79-81, 88-92.

Despite obstacles to outright reform, Chilean legal ingenuity has made it possible to prevent the amnesty law's being applied across the board. Hundreds of investigations into "disappearances" extrajudicial executions, and torture are still open in the courts. After 1991 many judges resisted applying the amnesty law to close unsolved cases, particularly those in which investigations had failed to establish the fate of the victim. This new trend was due in large part to President Aylwin's conviction that, given the impossibility of changing the law, as much justice as possible should be done by the courts with their existing powers. One of Aylwin's most important contributions to human rights was to transmit his concern about the "disappeared" directly to the Supreme Court when the Rettig Commission's report was published. It became an unconditional ethical principle on which both elected governments have firmly insisted. Polls show, moreover, that it is strongly supported by public opinion. The quest of the relatives "to find the disappeared" was established in national law as an "inalienable right" when President Aylwin established the National Corporation of Reparation and Reconciliation in February 1992. [110]

[110] Article 6 of Law 19,123 of February 8, 1992, creating the National Corporation of Reparation and Reconciliation.

The Rettig Commission's mandate prevented it from naming military officials alleged responsible for human rights violations. Aylwin's view was that the courts could make good this deficiency by withholding application of the amnesty law until the fate of the victim was established, the circumstances clarified, *and the persons claiming the benefits of the amnesty identified*. During the 1990s this doctrine competed in the judiciary with the narrow pre-Aylwin interpretation, giving rise to a multitude of contradictory decisions.[111] However, since former military officials have consistently refused to say what happened to "disappeared" prisoners, the Aylwin doctrine helped keep these cases alive. Scores (the army says hundreds) of former and active-service military officers, including generals, were called to testify either as suspects or witnesses.[112] The army, the branch most affected by these court investigations, deeply resented what it saw as a perverse re-interpretation of the law. Military displays of force in 1991 and 1993 failed to bring results, however, since Congress remained divided on the issue.

Opinion in the Supreme Court on the application of the amnesty law was also divided. In March 1995 the Frei administration restructured the Supreme Court. Appeals on criminal cases were henceforth to be heard exclusively by a specialized criminal panel (the Sala Penal). In many Sala Penal decisions, a minority of one or two judges favored the Aylwin doctrine and voted against the closure of cases. A majority of the panel, including its president, Roberto Dávila (now chief justice), ruled that the law be interpreted narrowly, without investigating facts and responsibilities.[113] On July 9, 1997, for example, the Sala Penal overturned the conviction by the Third Criminal Court of San Miguel in Santiago of a former DINA torturer in a 1974 "disappearance" case. Judge Lilian Medina Sudy had held that the accused did not qualify for amnesty because kidnaping was continuous until the victim was freed or certified to have been killed. However, when a military court also claimed jurisdiction, the Supreme Court overturned Medina's verdict and admonished her for passing sentence while the court dispute had not been settled. The military court ultimately won jurisdiction.[114] Other Supreme Court decisions on "disappearances" following the same doctrine were the cases of Joel Hualquiñir (1995), Eduardo Ziede Gómez (1998), and Eugenia Martínez Hernández (1998), in each of which the court rejected arguments based on the Geneva Conventions and the ICCPR. Signs of a shift toward the Aylwin doctrine at the Supreme Court level were not apparent until the first six months of 1998, when the court revoked application of the amnesty in a case involving the 1973 "disappearance" of twenty-four rural workers in Paine, near Santiago; of eight members of the MIR in Valaparaíso in 1975; and of Luis Ortíz Moraga in December 1974. The court's Second Chamber also broke with tradition in assigning jurisdiction to civilian judges in a small number of cases.

[111]See Arzobispado de Santiago, Fundación Documentación y Archivo de la Vicaría de la Solidaridad, *Situación de los Derechos Humanos Durante el Primer Semestre de 1998,* Santiago, pp. 20-22.

[112]In the first six months of 1999, 120 soldiers appeared before the courts. One hundred fifty appeared in 1997. "Molestia en las Filas," *Qué Pasa,* No. 1477, July 31, 1999.

[113]Pilar Molina, "Habrá o no amnistía ?" *Reportajes, El Mercurio,* August 1, 1999.

[114] The case concerned the "disappearance" of Gloria Lagos Nillson, detained by the DINA on August 26, 1974.

In January 1999, following the appointment of three new justices to the Sala Penal, a "post-Aylwin" doctrine began to emerge, based on the notion that "disappearance" is a continuous crime. On January 7, 1999, the Supreme Court ordered a military judge to reopen a case involving the "disappearance" in Parral, in the south of Chile, of twenty-six people arrested in 1973 and 1974. The Sala Penal held the crime to be "a permanent one, and in this situation it must be understood to continue to be committed after the expiry of the period covered by the amnesty law, since until now the victims have not reappeared, there is no news of them nor has their death been accredited."[115]

A more radical variant of the post-Aylwin doctrine held that the amnesty was tacitly derogated by international humanitarian or human rights law. In a September 1998 decision, the Sala Penal cited Chile's obligation under the 1949 Geneva Conventions as the basis for ordering a military court to reopen the investigation of the "disappearance" in July 1974 of one Enrique Poblete Córdova. The court argued that Common Article 3 of the Geneva Conventions applied because the military government had itself declared a "state or time of war" in September 1973, exactly reversing the doctrine it had followed earlier. Although there was no indictment in the case, the judgment implied that those eventually accused of the crime could be prosecuted and convicted. Indeed, the Chilean ministers of justice and foreign affairs referred to the Poblete Córdova case to support their argument in the House of Lords that the self-amnesty was not an insuperable obstacle to human rights trials for atrocities committed after the coup.

"Kidnapping is a Permanent Crime:" the Caravan of Death

While these decisions passed largely unnoticed by the general public, a July 1999 Sala Penal judgment, unanimously confirming the arrest and prosecution of a retired general and four other senior retired army officers, caused a major political impact. The five were accused of participating in the so-called "Caravan of Death," a helicopter-borne commando task force allegedly acting on Pinochet's orders, which removed from prison and secretly executed seventy-five political prisoners in the north and south of Chile in October 1973.[116] As noted previously, the case was part of the thirty criminal complaints against General Pinochet and other officials being investigated by Judge Juan Guzmán.[117] In view of the fact that the bodies of nineteen Caravan of Death victims had never been located or their death legally certified, Judge Guzmán held that their abduction was still current and hence excluded from the amnesty law, and he charged the five officers with "aggravated kidnapping." In cases in which he was able to establish the victims' death, Guzmán ruled the amnesty applicable; he thereby dismissed charges including first-degree murder (*homicidio calificado*) and torture, against five other officers. [118]

[115]Cited in Archivo de la Vicaría de la Solidaridad, *Informe Primer Semestre de 1999*, p. 24. Translation by Human Rights Watch.

[116]Those indicted were Gen.(r) Sergio Arellano Stark, Brig.(r) Pedro Espinosa, and retired colonels Sergio Arredondo, Marcelo Morén Brito and Patricio Díaz. Morén Brito was a DINA agent and commander of the notorious torture center Villa Grimaldi.

[117]On January 12, 1998, Communist Party President Gladys Marín filed an accusation of genocide, aggravated homicide, kidnaping, illegal association, and illegal burial against General Pinochet, for the abduction, disappearance, and murder of her husband Jorge Muñoz Poutays and more than four hundred other members of the party during the military regime. Other families or organizations later lodged their own accusations. They included Sola Sierra, then-president of the Assocation of Relatives of the Disappeared, on behalf of her husband, Waldo Pizarro Molina and 973 "disappeared" detainees; 400 members of the Leftist Revolutionary Movement (MIR); the Chilean Teachers Association on behalf of 103 teachers; twenty-six victims of the "Caravan of Death" in Calama; the metalworkers union on behalf of more than one hundred metalworkers; the Chilean Nurses Association (Colegio de Enfermeras de Chile), the Journalists Association (Colegio de Periodistas) on behalf of twenty-seven journalists, and individual families.

[118]Charges were dismissed against Armando Fernández Larios, Juan Chiminelli Fullerton, Juan Zanzani Tapia, Carlos Forestier Haensgen, and Marcos Herrera Aracena.

This decision may have important implications for hundreds of other "disappearances" in which evidence of execution or the discovery of remains has so far proved impossible to obtain. It means, in effect, that location of the bodies or disclosure of the truth about the fate of the "disappeared" is necessary before the accused may benefit from immunity, while the decision to eventually apply the amnesty law is a matter for the courts to decide in individual cases. There is a further possibility that the Supreme Court might still rule, as it did in the Poblete Córdova case, that the amnesty is inapplicable due to the provisions of international humanitarian and human rights law, even in circumstances in which the victims' death is established.

Experience, however, dictates caution in interpreting the significance of the Supreme Court verdict. The court has been notoriously erratic and inconsistent in its rulings on human rights cases. Since under Chilean law jurisprudence has no binding effect on future cases, there is ample room for the Supreme Court to modify its doctrine. Moreover, although the Chilean judiciary jealously protects its formal independence, in practice it is still permeable to political influence.

Lawyers acting for the victims in the Caravan of Death case appealed Judge Guzmán's decision to limit the indictments only to cases in which evidence of death was not established and called for the five defendants and five other members of the task force to be prosecuted as well for first-degree murder and torture. The Fifth Chamber of the Santiago Appeals Court gave its ruling on the appeal on August 26. Much hinged on this verdict, since if the appeal was granted, it would be an important step toward converting the amnesty law into a dead letter. Although possibly applicable to prevent convictions, the law would no longer bar trials for torture and extrajudicial executions, as well as "disappearances." Moreover, the appeals court's decision was final at this stage. In a divided judgment, the three-member panel ruled that there were insufficient grounds "at present" for widening the prosecutions to torture and executions. In addition, the court ordered former DINA agent Armando Fernández Larios indicted, bringing to six those now charged for "aggravated kidnapping."[119] The court declined to issue charges against General Pinochet, on the grounds that Judge Guzmán had not yet canceled his parliamentary immunity. The decision was notable in making no reference at all to the scope of the amnesty law in cases of homicide or torture, or to arguments presented by victims' lawyers that the Geneva Conventions were applicable. By avoiding these crucial issues, the decision left the door open for further efforts to sustain murder charges against the defendants.

The Fifth Chamber confounded initial predictions, reportedly shared by both parties in the case, that the court would decide in favor of expanding the charges. Lawyers involved in the appeal alleged that Aylwin's former justice minister, Francisco Cumplido, and a government legal official, Rodrigo Asenjo, had put pressure on the judges to change their predicted verdict.[120] Both officials denied any interference, and President Frei categorically rejected the accusations.

[119]Armando Fernández Larios participated in the Letelier assassination plot and later fled to the United States, where he gave important evidence in the trial of former DINA agent Michael Townley for the assassination. Fernández was convicted as an accomplice in that case. Later released under a plea-bargain, living incognito in Miami and for a period under the Justice Department's witness protection program, he now faces proceedings for extradition to Chile.

[120] The allegations were taken seriously enough by the conservative daily *El Mercurio* for it to lead its Sunday political section with a story headlined "Operation detente: how the danger of eliminating the amnesty was contained," ("Operación detente: cómo se conjuró el peligro de eliminar la amnistía"), *El Mercurio*, August 29, 1999.

Whatever the possible impact of political pressures on this verdict, the new opening for human rights trials marked by the Supreme Court position on the Caravan of Death case rang strident alarm bells on the right and in the armed forces. As has happened repeatedly throughout the Chilean transition, the search for political "solutions" to Chile's lack of reconciliation began in earnest as soon as the wheels of justice began to turn. Opposition and pro-military appointed senators issued a statement accusing the Supreme Court of trespassing on the legislature by "modifying or derogating" national laws; they held the Sala Penal responsible for "grave abandonment of duty," an impeachable offense. [121] Differences within the opposition on the issue became apparent when some Renovación Nacional (RN) leaders and opposition presidential candidate Joaquín Lavín opposed the senators' declaration and defended the autonomy of the courts.[122] The army generals, informed in advance of the Sala Penal judgment, met in a three-day conclave to discuss its implications, working until the early hours of the morning. Respecting established legal channels, on July 23 the four service chiefs met Defense Minister Edmundo Pérez Yoma and delivered a statement urging the government to look for solutions "allowing them to carry out their professional functions in due tranquility" and offering their "absolute readiness to cooperate."[123]

The Frei administration decided it could no longer afford to take a back seat. On July 24, Frei met with his inner ministerial circle to discuss possible responses. The chances of a negotiated political solution were now more remote than ever. There was little incentive for the relatives to participate since prospects of justice looked better for them than at any time before. The Supreme Court verdict appeared to remove one of the principal legal obstacles to a trial of Pinochet in Chile, a key demand of the Socialist Party. The ball, it seemed to the government, was now in the military's court. In a July 26 keynote speech to the 41st International Congress of Psychoanalysts, Frei ruled out any government legislative initiative. In a clear message to the armed forces, he described the situation as a stark dilemma:

> It is quite obvious that any new agreement must have as its result clarification of the fate of the "disappeared" detainees. On this matter, there is certainly a dilemma: to face up to this wound once and for all, and provide this information, or let the sustained action of the courts, year after year, over many years, gradually reconstruct the truth about what happened.... All those who have direct or indirect information on these events should meditate profoundly on this dilemma and its consequences.[124]

Frei's message appeared to be a reply to comments made by the army commander, General Izurieta, in April, just before he left on a "private" visit to Pinochet in London, denying that the army had information on the whereabouts of the "disappeared."[125]

The CNI in the Dock

[121] "Oposición cuestiona la actuación del poder judicial," *El Mercurio,* July 23, 1999.

[122] Gabriela de la Maza, "DD.HH.: acusación desordena a la derecha," *La Tercera,* July 24, 1999.

[123] "FF.AA pidieron solución definitiva en derechos humanos," *El Mercurio*, July 24, 1999.

[124] "Se aleja salida legislativa en los DDHH," *El Mercurio*, July 27, 1999.

[125] "Izurieta viajó a apoyar al Gral. Pinochet," *El Mercurio*, April 17, 1999.

The courts have also made important advances in the investigation of human rights crimes not covered by the amnesty law. Two Santiago Appeals Court judges, Milton Juica and Sergio Múñoz, are close to solving two of the most notorious human rights crimes of the 1980s, the murder of trade unionist Tucapel Jiménez and a massacre of guerrilla suspects called "Operation Albania" (Operación Albania). Jiménez, leader of the National Association of State Employees (Asociación Nacional de Empleados Fiscales, ANEF), was brutally murdered in his taxi on February 25, 1982, at a moment when he was helping to organize the first general strike against Pinochet's rule. There were no witnesses, but the CNI and the Intelligence Directorate of the Army (Dirección de Inteligencia del Ejército, DINE) were both implicated in the crime. On June 15 and 16, 1987 twelve alleged members of the armed opposition group Manuel Rodríguez Patriotic Front (Frente Patriótico Manuel Rodríguez, FPMR) died at the hands of CNI agents in what were officially described as shoot-outs during an investigation ordered by a military prosecutor. In fact, evidence uncovered by the court showed that at least seven of the victims had been extrajudicially executed after being arrested.[126]

Court investigations into both crimes, although not subject to the amnesty law, were stalled for years by official disinformation, the protection of suspects, suppression of evidence, and judges' prevarication. In the Albania case, the breakthrough came on July 27, 1998 (before Pinochet's arrest) when investigating judge Hugo Dolmetsch, a civilian member of the Military Appeals Court (Corte Marcial), charged five former agents, including serving army Col. Krantz Bauer and former army captain Luis Sanhueza, with the crime. Investigation of the facts had been stalled by a military court from September 1987 until March 1998, when the Supreme Court transferred the case to Judge Dolmetsch and instructed him to request confidential CNI files in army possession. The arrests and indictment of the officers was possible in large part due to a list of some 1,500 fomer CNI members that the army made available to the judge. Other arrests of former CNI agents followed in December 1998, including of two, Alvaro Corbalán Castilla and Jorge Vargas Bories, who had been implicated in other human rights crimes. Ten people are currently charged in the Operation Albania case.

In the Jiménez case the tide finally turned on March 30, 1999, when the Third Chamber of the Santiago Appeals Court ordered the investigation reopened (Judge Sergio Valenzuela Patiño had closed it at the end of 1998 after a fruitless investigation lasting nearly seventeen years) and ordered the arrest of twelve suspects, including former CNI agents and retired senior military officers. They included retired Gen. Rámsez Alvarez, former head of DINE. The court confirmed the existence of a so-called "Delta Plan," dedicated to the surveillance and even murder of opposition trade unionists.[127] On April 9, Jiménez's lawyers won a long campaign to have the Supreme Court remove Judge Valenzuela from the case (the fact that Valenzuela's son had worked for the CNI cast serious doubts over his impartiality). In May, the new judge, Sergio Múñoz Gajardo, sent written questions to Pinochet about his knowledge of the events and relationship to the CNI. So far, Pinochet is reported not to have responded. In both the Operation Albania and Jiménez cases, the Council for the Defense of the State had made itself a party to the investigations on behalf of the victims.

On September 14, retired Gen. Humberto Gordon, former director of the CNI and a member of the military junta from 1986 and 1988, was charged and detained as an accomplice in Jiménez's murder. Also charged for covering up the crime was retired Brig. Roberto Schmied Zanzi, former head of the CNI's metropolitan (Santiago) division. Schmied took refuge in a military base at Buín but was ordered to give himself up by his army superiors. Despite army anger at Gordon's indictment and pressure from the retired generals (they formed an association expressly to counter the activities of the courts) General Izurieta did not obstruct the trials. In part this was due to a public commitment by the armed forces, dating from Pinochet's days, to coooperate with investigations of crimes not covered by the amnesty law. In part it reflected concern about the negative effects any publicity about military

[126]See Americas Watch, *Chile: Human Rights and the Plebiscite,* pp. 66-69, for an analysis of contradictions between the official version of the events and facts uncovered by Chile's nongovernmental human rights groups.

[127]Fundación Documentación y Archivo de la Vicaría de la Solidaridad, *Informe, primer semestre de 1999*, p.15.

obstruction of human rights trials might have on Pinochet's defense in London. [128] As in the Albania case, the army agreed eventually to allow Judge Múñoz access to confidential lists of DINE members between 1981 and 1983, after the Supreme Court upheld the judge's request.

[128]Blanca Arthur, "El Ejército no está de fiesta," *El Mercurio*, September 19, 1999; Cony Stipicic and Gerardo Beltrán, "La coordinacion gobierno-ejército por Pinochet," *La Tercera*, September 19, 1999.

The prosecution of former generals associated with the Pinochet's former intelligence agencies is not expected to stop with Gordon's arrest. During the final week of September the press announced that Judge Milton Juica, who replaced Judge Dolmetsch in the Albania case in March, was about to prosecute retired Gen. Hugo Salas Wenzel, the CNI's director from 1986 to 1988, and his successor in the post, retired Gen. Humberto Leiva Gutiérrez. Also liable to arrest for helping cover up the Jiménez assassination were Gen. Hernán Ramírez Rurange, director of DINE in 1991, when it allegedly assisted the escape to Argentina of one of the agents implicated, and Brig-Gen. Gustavo Abarzúa, DINE director from 1989 to 1991.[129]

The Search for a Formula

As has occurred repeatedly since Pinochet allowed a return to civilian government, the military has pressed party leaders to seek a way to "solve" the human rights issue. The solution being sought generally involves making the problem disappear without affecting the military's protected status. Indeed, measures under discussion in the Senate would diminish even further the possibility of prosecuting those guilty of atrocities. The government has adopted, as policy, steps to limit the power of military courts ─ but these have yet to be enacted.

After the Pinochet crisis broke in October 1998 the government held to its official policy of non-intervention on the amnesty issue. Nevertheless, private initiatives to explore the issues continued, although without any sense of urgency. Tri-partite discussions between Minister of Interior Raúl Troncoso, Army Commander-in-Chief Ricardo Izurieta, and Archbisop of Santiago Msgr. Francisco Javier Errázuriz, began early in 1998, apparently in response to the opening of the Guzmán investigation in January that year. Efforts were made to keep the talks confidential and the victims were not represented. By March 1999 the talks had stagnated without agreement.[130]

Troncoso also commissioned two human rights experts to hold private meetings to explore alternatives with representatives of UDI and RN, church leaders, and both retired and serving officers of the armed forces, as well as representatives of the victims. Government leaders believed that Pinochet's arrest, world opinion, and the gathering momentum of the courts in Chile created a favorable climate for concessions by the armed forces.[131] Since these meetings have been held in absolute confidence (although details began to filter to the press in April), any agreements reached and even the names of some of the participants were unknown at this writing.

The most pressing and conflictive issue for the government was the army's continuing silence about the fate of the "disappeared." Concertación leaders hoped that the prospect of interminable human rights trials might focus the minds of military leaders on ways to "solve" the issue before a new government took office in March 2000. Positive signals from the armed forces, such as the personal interest in the issue taken by Navy Commander Adm. Jorge Arancibia, reinforced this impression. The challenge facing the government, however, was daunting. The armed forces required solid guarantees that the trials would come to a rapid end and that those officers or former officers who revealed information would be shielded from publicity as well as prosecution. The Concertación parties, on the other hand, opposed on principle a "full-stop" law added to the immunity already provided by the amnesty. The discussion focused on mechanisms to protect the identity of military witnesses who might give information on the fate of the "disappeared" and to exempt them from prosecution for perjury for previous, false declarations. Promises of secrecy as an inducement to obtain information on the fate of the

[129]María Luisa Córdova, "Los generales que vienen," *Qué Pasa,* no.1485, September 25, 1999.

[130]"Congelado diálogo tripartito sobre DDHH," *La Tercera,* March 22, 1999.

[131]Human Rights Watch interview with human rights lawyer José Zalaquett, a participant in these discussions, August 3, 1999.

"disappeared" had been part of earlier reconciliation efforts by Aylwin in 1993 and Frei in 1995. Both initiatives had met opposition from both sides and failed to gain congressional support. [132]

Other measures, proposed by the PPD-PS bloc and adopted by the government, such as a draft law allowing civilian judges to investigate inside military and police premises, would have been positive additions to the powers of the judiciary. In addition, a Chamber of Deputies commission was debating legislation to bring human rights cases involving members of the armed forces under civilian jurisdiction. At this writing neither measure had cleared the hurdles of Congress.

Parallel discussions on measures to discover the truth about the "disappeared" in the Senate's Commission on Human Rights, Nationality, and Citizenship, whose members range from the UDI to the Socialist Party, began in June 1998 and culminated in a concrete proposal in December. The commission proposed unanimously that the courts' mandate to continue investigating "disappearances" cases be extended indefinitely. Article 6 of Law 19,123, which held it to be an "inalienable right"of Chileans to demand clarification of the fate and whereabouts of the "disappeared," was to be interpreted to mean that this right could not be canceled by the prior closure of cases by the courts.

[132]Both Presidents Aylwin and Frei proposed legislation that would promote judicial investigation of cases of "disappearance" while protecting the anonymity of witnesses. Each proposal failed, as did a measure proposed by rightist opposition leaders to trade constitutional reforms for curbs on human rights court investigations. Each of these parliamentary initiatives was the direct or indirect result of military pressure. The Aylwin proposal can be traced back to the so-called Boinazo in May 1993. The Frei proposals sprang from civil-military tensions at the time of the arrest and imprisonment of General Contreras in October 1995.

Other aspects of the Senate proposals seriously threatened the transparency of judicial investigations. To encourage former military personnel to testify, they would be shielded from identification and exempted from prosecution for perjury for false declarations they might previously have made. Although the proposal did not refer to the self-amnesty law, it was understood that once a court investigation had established the fate of the victim, the case would be subject to the terms of that law. The underlying logic, as in previous legislative attempts, was to trade secrecy and impunity for long-withheld information, privileging partial truth over justice. Moreover, the "truth" it was hoped to obtain was incomplete, being limited to the discovery of physical remains or the certification of death without identification of those responsible.[133]

In a letter to President Frei sent in June 1999, Human Rights Watch expressed concern that the effect of keeping the identity of witnesses secret would extend the effects of the self-amnesty law and implicitly legitimize it. Nor did the Senate committee consider justice for other human rights violations, including torture. Indeed, in giving Chile's assurances to Home Secretary Straw that the Chilean courts, unlike the Spanish, had authority to investigate crimes committed in Chile before December 1988, the government seriously misrepresented the facts regarding cases of torture, which are subject to a five-year statute of limitations in Chile.[134] By July it had become evident that the Senate proposal was not politically viable: the relatives of the "disappeared" categorically rejected it, while the army considered the guarantees of confidentiality insufficient.

At this writing Chile has embarked on yet another round of talks, this time convened by Defense Minister Pérez Yoma in reaction to army disquiet caused by the Sala Penal decision in July. Unlike in earlier proposals, Pérez Yoma aimed to get the most radically opposed parties (the relatives of the "disappeared" and the armed forces) round a table for the first time in open face-to-face conversations. The novelty of this idea was that it struck into unchartered territory: it was hoped that a frank encounter might confront and overcome prejudices on both sides. The relatives of the "disappeared," however, refused to join the conversations. They considered that any negotiations might produce a negative impact on the courts, at a time when the Supreme Court appeared for the first time to be mounting a serious challenge to the amnesty law. Moreover, they attacked the initiative as a public relations gambit aimed at influencing the Pinochet proceedings in London. As a result of their refusal to participate, the table comprised only human rights attorneys (acting in their own capacities, rather than representing the relatives), delegates from the armed forces, and representatives from civil society. The group held its first meeting on August 31, 1999.

[133]Senator Enrique Silva Cimma, a member of the Senate commission that drafted the proposal, said that punishment would be impossible because of the self-amnesty law but that the intention was to enable the relatives to know where the bodies are and to bury them. "Inician estudio de ley sobre DDHH," *El Metropolitano,* May 29, 1999.

[134]Article 94 of the Penal Code.

It is far from clear at this writing what the outcome of these conversations will be. The first month was limited to hearing out expositions by all of the parties in turn. Press reports of the interventions revealed no surprises from the armed forces' side. Vice-Adm. Alex Waghorn said on behalf of Admiral Arancibia that the talks might "generate the conditions under which those who might have some information might feel motivated to provide it" if a climate free of "threats of coercion" was created. In their opening statements neither Waghorn nor General Izurieta's representative, Gen. Juan Carlos Salgado, acknowledged any institutional responsibility for human rights violations. Arancibia himself denied that the navy committed torture and later clarified his remarks by saying that if abuses occurred they were committed by individuals under emotional pressure, and against navy policy.[135] The conditions the armed forces hope will be created by the talks involve both secrecy and impunity, which the human rights lawyers opposing them have rightly said they will not accept, another reason for pessimism.

The discovery of physical remains is, to be sure, of major importance for humanitarian reasons. It is, nonetheless, only part of the truth required. The vital missing ingredient is a truthful description by the institutions concerned of the methods used; acknowledgment of their absolute wrongfulness, regardless of the circumstances involved; and a public renunciation of the use of such methods in the future, whatever social or political tensions might prevail.

Government policy should also give priority to securing guarantees of justice for the victims of the military regime. As the United Nations expert on impunity pointed out in his final report, all victims should have "the opportunity to assert their rights and receive a fair and effective remedy, ensuring that their oppressors stand trial and that they obtain reparations." The report adds that "the right to justice entails obligations for the state: to investigate violations, to prosecute the perpetrators, and, if their guilt is established, to punish them."[136]

[135]"El perdón puede facilitar alcanzar la verdad," *La Tercera,* September 9, 1999; "Arancibia conextualizó dichos," *El Mercurio,* September 9, 1999.

[136]Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities*, The Administration of Justice and the Human Rights of Detainees,* Question of the impunity of perpetrators of human rights violations (civil and political), revised final report prepared by Mr. Louis Joinet pursuant to Sub-Commission decision 1996/119, E/CN.4/Sub.2/1997/20/Rev.1, October 2, 1997, paras. 26 and 27 respectively.

From its outset the Spanish investigation sought documentary evidence of Pinochet's relation to and control over the functioning of the Chilean security apparatus. Chile's refusal to cooperate with the investigation made this a difficult task. The departing military government never turned over to the elected authorities classified military or intelligence files such as those of the DINA and the CNI. Most of the information available in Chile, apart from direct testimony, consisted of public documents such as legal decrees, court decisions, and reports by human rights NGOs and the press. The United States, on the other hand, had acquired mountains of intelligence on Chilean military agencies, on the formation, growth, and activities of the DINA, and of its relation to Pinochet, information that could be critical to proving Pinochet's guilt.

The U.S. had increasingly engaged in covert action in Chile from the 1960s onwards. Revelations of Central Intelligence Agency attempts under the Nixon administration to thwart the election of President Salvador Allende in 1970, and its controversial role in his 1973 overthrow, led to one of the most thorough congressional investigations of the CIA's activities ever conducted, chaired by Senator Frank Church. [137] A year later the Letelier assassination in Washington set off a major murder hunt which gave U.S. investigators valuable evidence about the workings of Operation Condor. U.S. agencies are also believed to possess crucial information about human rights violations inside the country from 1973 to 1975, when U.S. officials maintained close contact with the DINA's director, Manuel Contreras.

In February 1997, Spain invoked a bilateral Mutual Legal Assistance Treaty with the United States to request that the Clinton administration make available its files on human rights violations in Chile. Although Clinton promised support in response to congressional questions in April 1998, that support was extremely slow to materialize. The White House said little at Pinochet's arrest, and when pressure in Europe for his extradition mounted, State Department spokesman James Rubin rushed to Chile's defense, asking that Chile's efforts to harmonize reconciliation and justice be respected.[138] After some positive initial signals, the Justice Department decided not to proceed with a request for Pinochet's extradition to the United States to stand trial in the U.S. for the Letelier-Moffitt assassination.

The Clinton administration's nervousness arose from the same concerns it had expressed in voting against the Rome Statute establishing the International Criminal Court in June 1998: that former U.S. government officials and soldiers on foreign duty could be subjected to prosecutions. The administration sympathized with Chile's predicament. As the *New York Times* put it:

> Suppose Cambodians decide to indict Henry Kissinger of charges of ordering the bombing of their country during the Vietnam war. Chances are that the United States would be quick to take a line of defense not unlike Chile's, saying that history has rendered its judgment on that war, people on the whole do not get tried for policies and American courts have dealt with those individuals who had committed offenses.[139]

[137]The Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, *Covert Action in Chile, 1963-1973* (Washington, D.C., 1975).

[138]"EE.UU pide que se respete a Chile," *La Tercera*, December 1, 1998.

[139]Barbara Crossette, "Dictators (and some lawyers) tremble," *New York Times*, November 29, 1998.

The United States' role in Chile during the 1970s, moreover, was highly controversial. Documents declassified in 1998 indicated that the U.S. had not only paved the way for Pinochet to seize power but helped him keep it. A briefing prepared in November 1973 for Secretary of State Henry Kissinger on summary executions and killings in the three weeks that followed the military coup revealed that Washington was giving Chile economic and military aid while these abuses were at their height.[140] Other documents indicated that FBI agents cooperated with the Chilean police, providing them information about Chilean dissidents detained in other countries.[141] A damning "memcon" (conversational record) revealed the details of a conversation between Kissinger and Pinochet in June 1976, in which Kissinger reassured the dictator that the speech he (Kissinger) was due to make in the OAS General Assembly criticizing Chile's human rights record was to be interpreted as an unavoidable concession to liberal opinon in the United States and was not aimed at Chile. [142]

On February 1, 1999, finally bowing to international pressure, requests from Congress, and calls from some of Pinochet's most famous victims, the White House requested U.S. national security agencies to declassify and release documents that shed light on human rights abuses, terrorism, and other acts of political violence in Chile. In April 1999 Attorney General Janet Reno allowed access to declassified documents to Judge Maria Servini de Cubría, who was investigating the 1974 assassination of former Chilean Army Commander Carlos Prats in Buenos Aires. She also gave permission to the Argentinian judge, as well as to Judge Garzón, to interview Michael Townley, the former DINA agent convicted in the United States for the Letelier-Moffitt murder and released under a witness protection program.[143]

On June 30, 1999, the Clinton administration made public an estimated 5,300 documents, totalling more than 20,000 pages, most of them related to the period 1973-1978. Thousands more documents were promised later in the year. The State Department, which had sent advance copies to the Chilean Foreign Ministry and Chile's Washington embassy two days before the launch, posted the documents on its website, and they were available for inspection by the public in Santiago's National Library. United States Amb. John O'Leary told the Chilean press that the release was due to congressional and public interest and entirely unrelated to Pinochet's arrest.[144]

Among the declassified documents was a Department of Defense memo dated February 2, 1974, which stated that the DINA was "directly subordinate to the President of the military junta, General Pinochet" and was estimated already to have 700 active agents, even though its official date of creation was not until November 1974. The memo also noted that DINA operatives "are not properly trained for their jobs,"especially in interrogation techniques: "source said that their methods are straight out of the Spanish inquisition and often leave the person interrogated with visible bodily damage."

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[140]Peter Kornbluh, "Prisoner Pinochet: the Dictator and the Quest for Justice," *The Nation* (New York), December 21, 1998.

[141]According to a declassified FBI document, in 1975 agent Robert Scherrer gave the director of Chile's Investigations police, Gen. Ernesto Baeza, information about Jorge Isaac Fuentes, a member of the Revolutionary Left Movement (MIR) who was arrested by the Paraguayan police in 1975. Tim Weiner, "F.B.I. Helped Chile Search For Leftists, Files Show" *The New York Times*, February 10, 1999. Documents found in the archives of the dictatorship in Paraguay show that the Paraguayan police handed over Fuentes to the Chilean security forces, after which all trace of him was lost. Comité de Iglesias and International Human Rights Law Group, "Tortura en Paraguay: pasado y presente," Asunción, 1993, p. 23.

[142]Lucy Komisar, "Kissinger covered up Chile torture," *The Observer,* February 28, 1999; Peter Kornbluh, "Kissinger and Pinochet,"*The Nation,* March 29, 1999.

[143]"Prats: EEUU da luz verde a Townley", *La Tercera,* April 27, 1999.

[144]Paola Sais, "Archivos CIA: 'Gobiernos sacarán conclusiones'," *La Tercera,* March 15, 1999.

Human Rights Watch welcomed the release as a significant step in the search for truth and accountability for both Chilean and U.S. actions. Along with the National Security Archive,[145] we expressed serious concern that the CIA had declassified only a fraction of its vault of files. What had been made public amply showed the detailed knowledge the CIA, FBI, and State Department had of the savage human rights abuses taking place in Chile and their continuing cooperation with their Chilean counterparts notwithstanding.

But there are glaring gaps that leave many questions unanswered. What were the circumstances of the execution of U.S. citizens Charles Horman and Frank Terrugi in the aftermath of the coup? Did U.S. intelligence have enough information on Operation Condor to have prevented Letelier's and Moffitt's murder? Did the CIA play a role in training or assisting the DINA? [146] As for Pinochet's actions, current Foreign Minister Juan Gabriel Valdés emphasized that after a detailed perusal of the entire file, a ministry team had found nothing likely to affect the proceedings against him. This was a surprising conclusion, since some documents provided hirtherto unknown details on crucial questions such as the relationship among DINA, Pinochet and the rest of the armed forces.[147]

Both the U.S. decision to disclose details of its clandestine involvement in Chile as well as the Spanish prosecution itself bear witness to an essential fact about this tragic quarter-century of Chilean history: its roots and its repercussions extend far beyond Chile's frontiers. Neither the Cold War context in which the drama was played out, nor the clandestine meddling by a foreign power in Chilean political affairs, nor the forced diaspora of Chilean exiles, nor the violent reprisals taken againt them by Pinochet's agents respected the boundaries or rights of nationhood. The enormous value of the Spanish case is to re-affirm a principle easily overlooked in controversies about sovereignty and jurisdiction: human rights belong not to nations but to humankind, and for this very reason have always depended crucially for their protection on international cooperation.

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[145]The National Security Archive is a nongovernmental freeedom of information advocacy group, whose Chile Documentation Project led the campaign for declassification.

[146] "Not a single document that illuminates the close operational relations between the CIA station in Santiago and the Chilean regime and its intelligence apparatus was released. Nor were hundreds of internal memorandums from Langley headquarters that record policy decisions to assist the new regime covertly with equipment, training and logistics." Peter Kornbluh, "Chile declassified: newly released documents reveal close U.S. ties to the Pinochet regime," *The Nation,* August 9-16, 1999. According to Gen. Manuel Contreras in a July 1999 statement made from Punta Peuco prison, CIA instructors helped train DINA operatives in the National Intelligence School from March to August 1974.

[147] "Descartan sorpresas en los documentos desclasificados," *El Mercurio*, July 2, 1999.

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